

No. 11757
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

TIDE WATER ASSOCIATED OIL COMPANY, a
corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLE-
HEM STEEL CORPORATION, a corporation,

Appellees.

APOSTLES ON APPEAL

(In Two Volumes)

VOLUME I

(Pages 1 to 240, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italics*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italics* the two words between which the omission seems to occur.]

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Los Angeles 14, Calif. [1*]

In the United States Circuit Court of Appeals
for the Ninth Circuit

TIDE WATER ASSOCIATED OIL COMPANY, a
corporation,

Appellant,

vs.

DAVID LAWTON RICHARDSON and BETHLE-
HEM STEEL COMPANY, a corporation,

Appellees.

UNITED STATES OF AMERICA, ss.
CITATION

To David Lawton Richardson, and to His Proctors,
Gaines Hon and Irving Feintech; to Bethlehem Steel
Company, a Corporation, and to Its Proctors, Messrs.
Lillick, Geary & McHose, Greeting:

You are hereby cited and admonished to be and appear
at a United States Circuit Court of Appeals for the
Ninth Circuit, to be held at the City of San Francisco,
in the State of California, on the 18th day of October,
A. D. 1947, pursuant to an order allowing appeal filed
on September 8th, 1947 in the Clerk's Office of the Dis-
trict Court of the United States, in and for the Southern
District of California, in that certain cause No. 4574 W,
Central Division, wherein Tide Water Associated Oil
Company, a corporation, is appellant and you are appellees
to show cause, if any there be, why the decree, order
or judgment in the said appeal mentioned, should not be

corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 8th day of September, A. D. 1947, and of the Independence of the United States, the one hundred and seventy-first year.

PAUL J. McCORMICK

U. S. District Judge for the Southern District of
California

Petition for Appeal, Order Allowing Appeal and Assignments of Error.

Service of a copy of the foregoing Citation is acknowledged this 10th day of September, 1947. Lillick, Geary & McHose, John C. McHose, Proctors for Respondent, Bethlehem Steel Company, a corp. Gaines Hon and Irving Feintech, Gaines Hon, M. R., Proctors for Libelant.

[Endorsed]: Filed Sep. 10, 1947. [2]

To the District Court of the United States
Southern District of California
Central Division

In Admiralty No. 4574 H

DAVID LAWTON RICHARDSON,

Libelant,

vs.

GH LBF COMPANY
BETHLEHEM STEEL CORPORATION, a corpora-
tion; TIDE WATER ASSOCIATED OIL COM-
PANY, a corporation; JOHN ONE; JOHN TWO;
JOHN THREE; JOHN FOUR; JOHN FIVE;
JOHN SIX,

Respondents.

LIBEL IN PERSONAM
(Damages—Personal Injuries)

The Libel and Complaint of David Lawton Richardson,
Libelant, in a cause of damage for personal injuries, civil
and maritime, alleges and propounds as follows:

ARTICLE FIRST.

GH LBF Company

That the Respondent, Bethlehem Steel Corporation,
a corporation, is a corporation organized and existing
under the laws of the State of Delaware, and is authorized
to transact business in the State of California.

ARTICLE SECOND.

That the Respondent, Tide Water Associated Oil Com-
pany, a corporation, is a corporation organized and ex-
isting under the laws of the State of Delaware, and is

authorized to transact business in the State of California. [3]

ARTICLE THIRD.

Libelant is ignorant of the true names or capacities, whether individual, associate, corporate or otherwise of the Respondents, John Two, John Three and John Four and therefore sues said Respondents and each of them by such fictitious names and prays that their true names and capacities when ascertained may be incorporated herein by appropriate amendment.

ARTICLE FOURTH.

That the Respondents, John One, John Five and John Six, are sued herein under fictitious names for the reason that their true names at this time are not known to Libelant and when Libelant ascertains their true names, he will ask leave of Court to insert their true and correct names in the place and stead of said fictitious names.

ARTICLE FIFTH.

That at all times herein mentioned, the Respondent John One, was the agent, servant and/or employee of his co-Respondents, and at the time of the happening of the accident was acting within the course and scope of his employment and/or agency; said Respondent, John One, at the time and place referred to in this Libel was charged with the duty of permitting members of the Coast Guard to board the S. S. Frank G. Drum for the purpose of making inspections of said ship.

ARTICLE SIXTH.

That at all times herein mentioned the Respondent, John Five, was the agent, servant and/or employee of his co-Respondents and at all times herein mentioned was acting within the course and scope of his employment and/or agency and that at said time and place said Respondent was in charge of that certain ship which was then and there known and referred to as "S. S. Frank G. Drum, hereinafter mentioned. [4]

ARTICLE SEVENTH.

That at all times herein mentioned the Respondent, John Six, was the agent, servant and/or employee of his co-Respondents, and at the time of the happening of the accident hereinafter mentioned was acting within the course and scope of his employment and/or agency.

ARTICLE EIGHTH.

That at all times herein mentioned the Respondent, Tide Water Associated Oil Company, a corporation, and John Four were the owners and operators of that certain ship above referred to, to-wit: "SS Frank G. Drum", and at the time of the happening of the accident hereinafter mentioned, said ship was on navigable waters of the United States of America, to-wit: at the repair docks

GH LBF Company

of the Respondents, Bethlehem Steel ~~Corporation~~, a corporation, and John Two and John Three, Terminal Island, Harbor of Los Angeles, State of California; Libelant is informed and believed and upon such information and belief alleges that said ship was so docked at said place and time for the purpose of undergoing repairs

by the said Respondents, Bethlehem Steel Corporation, a corporation, and John Two and John Three.

ARTICLE NINTH.

That at all times herein mentioned the Libelant was and still is a member of the United States Coast Guard acting in the capacity of Seaman First Class.

ARTICLE TENTH.

That on the 6th day of August, 1944, Libelant was attached to Company A, C. O. T. P. Guard Battalion, Terminal Island, California; on said date the Libelant was in charge of a detail of guards in connection with patrolling, among other things, docks of Bethlehem Steel

Company GH LBF

~~Corporation~~, a corporation, John Two and John Three and ships located on navigable waters of the United States of [5] America, at said docks of the Bethlehem Steel

Company GH LBF

~~Corporation~~, a corporation, John Two and John Three, Terminal Island, Harbor of Los Angeles, State of California; Libelant's duties at said time and place as a member of the United States Coast Guard were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and

GH LBF Company

ships at said Bethlehem Steel ~~Corporation~~, a corporation, John Two and John Three; that at said time and place the Respondents knew or in the exercise of ordinary care should have known all of the duties of Libelant as above set forth.

ARTICLE ELEVENTH.

That at about the hour of 9:10 o'clock P. M. on August 6, 1944, Libelant entered said ship, S. S. Frank G. Drum, in his official capacity and in line with his duties, for the purpose of, among other things, inspecting said ship for the benefit of the Respondents herein.

ARTICLE TWELFTH.

That at said time and place the Respondents knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained said S. S. Frank G. Drum and the repair docks where said boat was docked and further knowingly, negligently, carelessly, recklessly and unlawfully caused, maintained and permitted the hatch to the bunker of said ship to remain open and unguarded and in a dark condition without any illumination whatever to warn people on said ship that said hatch was in said condition, all of which was well known to the Respondents and each of them. Libelant further alleges that the accident herein complained of was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of Respondents and charges that said Respondents are liable for the damages herein claimed because said [6] Respondents are at fault in the following, among other particulars, viz:

(a) At all times herein mentioned, the hatch to the bunker tank of said ship, which was approximately thirty-five (35) feet in depth, remained open and unguarded.

(b) At all times herein mentioned the hatch to the bunker tank of said ship was and remained in a dark condition without any illumination whatever.

(c) There were no illuminating signs or signs whatever to warn people on or about said ship that said hatch was open and unguarded.

(d) There were no precautions taken by Respondents or any of them, to warn or let people on or about said ship know that said hatch was open and unguarded.

(e) Respondents failed and neglected to have any person at or near said unguarded hatch to inform people at or near said hatch that the same was open and unguarded.

(f) That the Respondents permitted said hatch to remain open, unguarded and in a dark condition, all of which constituted a trap for people on said ship at or near said hatch.

(g) Respondents knew that said ship would be inspected by a member of the United States Coast Guards and notwithstanding such knowledge permitted said hatch to remain unguarded and in a dark condition. [7]

There is negligence in other respects as will be shown upon the trial.

ARTICLE THIRTEENTH.

Notwithstanding the knowledge and existence of the dangerous condition of the ship and the hatch thereon above referred to, the Respondents invited and permitted Libelant onto said ship for the purpose of making the inspection above referred to and the Libelant, while making said inspection and due to the negligence, carelessness, recklessness and unlawfulness of the Respondents as here-

in alleged, did fall into said open hatch and was precipitated a distance of approximately thirty-five (35) feet to the bottom of said tank thereby damaging and injuring said Libelant as hereinafter set forth.

ARTICLE FOURTEENTH.

That as a result of the negligence of the Respondents as alleged, Libelant was hurt in his health, strength and activity, received a profound shock to his nervous system and was made sick, sore and lame and more particularly Libelant was hurt about his head, limbs and body and did receive a severe fracture to the right femur; from said injuries Libelant has suffered great physical pain and mental anguish and is informed and believes and upon such information and belief alleges that his injuries are permanent and that he will suffer for a long time in the future, all to his damage in the sum of \$45,000.00.

ARTICLE FIFTEENTH.

That as a result of the negligence of the Respondents as alleged, Libelant was confined to the United States Naval Hospital in Long Beach from August 6, 1944, to and including January 5th, 1945, and on that date was transferred to the Naval Convalescent Hospital, San Bernardino, California, where he is now convalescing; that Libelant, in order to walk, was compelled to use crutches up to and including June 4, 1945, and since said time is compelled to [8] use a walking stick at intervals.

ARTICLE SIXTEENTH.

That as a result of the negligence of the Respondents as alleged it was necessary for Libelant's right leg to be in four different plaster-of-paris casts from August 8,

1944 to and including April 30, 1945 and as a result of the negligence of said Respondents, it was necessary that a stainless steel plate approximately seven and one-half inches in length be fastened to the bone at the fracture site of the right femur in order to keep said bone in place and Libelant is informed and believes and upon such information and belief alleges that it will be necessary that said steel plate remain fastened to said femur bone for the remainder of Libelant's natural life.

ARTICLE SEVENTEENTH.

Libelant is informed and believes and upon such information and belief alleges that he will never be physically able, on account of said injuries, to follow his regular duties as a member of the United States Coast Guard and as a result of the said injuries will in the near future be discharged from the said United States Coast Guard and forced to seek a gainful occupation in civilian life; Libelant is informed and believes and upon such information and belief alleges that his injuries will greatly hamper him from competing on the open labor market for gainful employment, all to his further damage in the sum of \$25,000.00.

ARTICLE EIGHTEENTH.

Libelant is informed and believes and upon such information and belief alleges that S. S. Frank G. Drum is now and will be during the pendency of this libel within the district and jurisdiction of this Court. [9]

ARTICLE NINETEENTH.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this honorable Court.

ARTICLE TWENTIETH.

That at all times herein mentioned the Respondents,
GH LBF Company
Bethlehem Steel ~~Corporation~~, a corporation, and Tide
Water Associated Oil Company, a corporation, were and
still are transacting business in the State of California
and particularly were and still are transacting business
within the jurisdiction of this honorable Court.

Wherefore your Libelant prays that this Court cause
to be issued a Monition requiring Respondents to appear
and answer, all and singular, the matters aforesaid, that
the Court will be pleased to pronounce for the damage
aforesaid with interest and costs and will give the Libelant
such other and further relief as in law and justice he is
entitled to receive.

IRVING FEINTECH
315 West Ninth St.
Los Angeles, Calif.

GAINES HON
By Irving Feintech
315 West Ninth St.
Los Angeles, California
Attorneys for Libelant [10]

[Verified.]

[Endorsed]: Filed Oct. 16, 1945. [11]

[Title of District Court and Cause]

RESPONDENT TIDE WATER ASSOCIATED OIL
COMPANY, A CORPORATION'S EXCEP-
TIONS TO LIBEL IN PERSONAM

Comes now the respondent, Tide Water Associated Oil Company, a corporation, and excepts to the libel herein as follows:

I.

Excepts to the sufficiency of the said libel upon the ground that it fails to allege any facts showing that the relationship of invitor and invitee existed between said respondent and the libellant.

II.

Excepts to the sufficiency of the said libel upon the ground that as a matter of law the facts alleged show at most that the libellant boarded the SS "Frank G. Drum" under a commission to board given by law and there are no facts alleged showing a breach of any duty which may have been owed by this respondent to the libellant under said circumstances. [12]

III.

Excepts to the lack of distinctness in the allegations of the Fifth Article in that it is impossible for the respondent to ascertain from said allegations whether John One was a licensed officer of the SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum."

IV.

Excepts to the allegations of the Sixth Article upon the ground that they lack distinctness with reference to John Five in that it is impossible to ascertain therefrom

whether John Five was a licensed officer of the said SS "Frank G. Drum" or a member of the crew of said SS "Frank G. Drum"; and also upon the ground that it cannot be ascertained from said allegations how John Five could be the agent, servant and/or employee of all of his co-respondents, said libel also alleging in the Fifth Article that the respondent John One was the agent, servant and/or employee of his co-respondents, including John Five, referred to in the Sixth Article.

V.

Excepts to the allegations of the Fifth, Sixth and Seventh Articles upon the ground that they lack distinctness in that in the Fifth Article John One is alleged to be the agent, servant and/or employee of his co-respondents; and in the Sixth Article John Five is alleged to be the servant, agent and/or employee of his co-respondents; and in the Seventh Article John Six is alleged to be the agent, servant and/or employee of his co-respondents; and it cannot be ascertained from the said pleading how each one of these respondents sued by fictitious names, to wit, John One, John Five and John Six could, at one and the same time, be the employees of each other and the servants and employees of each other. [13]

VI.

Excepts to the Seventh Article in that the allegations lack distinctness with reference to the respondent John Six and it cannot be ascertained therefrom whether John Six was a licensed officer of the SS "Frank G. Drum" or a member of the crew of the SS "Frank G. Drum."

VII.

Excepts to the allegations of the Tenth Article upon the ground that they lack distinctness with reference to the libellant's alleged duties in that it cannot be ascertained what is meant by the allegation that the libellant's duties "were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and ships at said Bethlehem Steel Corporation, a corporation; there being no allegation in the libel that any guards were on duty aboard said vessel.

VIII.

Excepts to the relevancy and competency of the allegation in the Eleventh Article that the libellant entered said ship "for the purpose of, among other things, inspecting said ship for the benefit of the respondents herein," in that said allegation is a conclusion.

IX.

Excepts to the relevancy and competency of the allegation in the Twelfth Article that the respondents "knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained . . . the repair docks where said boat was docked," for the reason that there is no allegation of any fact showing a proximate causal connection between any act or omission with reference to the repair docks and any injury sustained by the libellant. [14]

X.

Excepts to the relevancy and competency of the allegation in the Twelfth Article "that the accident herein complained of was entirely due to the manifest incompetency,

fault, negligence, carelessness and unlawfulness of respondents," upon the ground that said allegation is a conclusion.

XI.

Excepts to the language in the Twelfth Article "among other particulars" with reference to alleged fault, upon the ground that said language is not sufficient to charge any specific negligent act on the part of the respondent and general Admiralty Rule 22 requires the libellant to propound and allege in distinct articles the various allegations of fact upon which the libellant relies in support of his suit.

XII.

Excepts to the relevancy and competency of the recital in subdivision (f) of the Twelfth Article—"all of which constituted a trap for people on said ship at or near said hatch," in that said recital is a conclusion.

XIII.

Excepts to the last allegation in the Twelfth Article, to wit, "There is negligence in other respects as will be shown upon the trial," upon the ground that said allegation lacks sufficiency and distinctness.

Wherefore, respondent prays that its exceptions be sustained and that if the libel is not amended within such time as this Court shall allow, if at all, said libel may be dismissed.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation [15]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EXCEPTIONS TO LIBEL

I.

Libellant, as a matter of law, is not an invitee.

Title 14 USCA, Sec. 45, provides that "commissioned, warrant and petty officers of the Coast Guard are empowered to make inquiries, examinations, inspections, searches, seizures and arrests upon the navigable waters of the United States for the prevention, detection and suppression of violation of laws of the United States. For such purpose, such officers are authorized at any time to go on board of any vessel, subject to the jurisdiction, or to the operation of any law, of the United States, to address inquiries to those on board, to examine the ship's documents and papers, and to examine, inspect and search the vessel and use all necessary force to compel compliance. . . ."

The libel alleges that the SS "Frank G. Drum" was on navigable waters of the United States; that the libellant on the 6th day of August, 1944, was in charge of a detail of guards; that he boarded said vessel in his official capacity and in line with his duties. Under such circumstances it cannot be logically contended that the libellant was an invitee. The respondent had no possible right to refuse to permit the libellant to board the vessel. If it had refused to permit him to board the vessel he was authorized to use all necessary force to compel compliance. An invitation does not exist unless the alleged invitor has lawful power to permit or refuse to permit another person to enter upon real or personal property. How can it be contended that the libellant could have used physical force to accomplish his duty as a member of the armed forces

of the United States in time of war in boarding the said vessel and at the same time say that the respondent invited him to come aboard the vessel? [16]

The only object for which the libellant could have boarded the vessel in the course of his duty as a member of the armed forces of the United States would be to prevent, detect and suppress violations of statutes of the United States. In other words, he comes within a group of persons who are in the same category as firemen and policemen.

“It has been held that a policeman or constable entering private premises in the performance of his duty is a mere licensee to whom the owner owes no common law duty to keep the premises safe, although the owner may be liable for an injury resulting from his neglect of a statutory duty with respect to the condition of the premises.”

45 Corpus Juris, 794, sec. 199.

“A member of a public fire department who enters a building in the exercise of his duties is a mere licensee under permission to enter given by law, and the owner or occupant of the building does not owe to such person any duty to keep the premises in a safe condition.”

45 Corpus Juris, 794, sec. 200.

In the libel there is no allegation of any fact showing any neglect of any statutory duty with respect to the condition of the SS “Frank G. Drum.”

“In the majority of jurisdictions the rule is well settled that, in the absence of a statute or municipal ordinance, a member of a public fire department,

who, in an emergency, enters on premises in the discharge of his duty, is a mere licensee, [17] under a commission to enter given by law, to whom the owner or occupant owes no greater duty than to refrain from the infliction of wilful or intentional injury.” (Emphasis added).

13 A. L. R. 638.

Please see also:

141 A. L. R. 584, supplementing the annotation in
13 A. L. R. 637-638.

There is no allegation in the libel of any overt act on the part of the respondent.

Assuming, for the sole purpose of argument, (in spite of the authorities hereinabove cited) that the libellant could have been an invitee of the respondent aboard said vessel, there is no allegation of any fact showing that he was invited to be in the particular part of the vessel where he sustained his injury. It is an elementary principle that a person may be an invitee in one part of premises and a trespasser or licensee in other parts. For instance, a passenger on an ocean-going liner is an invitee while using those parts of the vessel set aside for the accommodation or amusement of passengers. On the other hand, if a passenger, out of curiosity, roams around the engine room, even with the consent of the licensed officers in charge thereof, he would be a licensee. If he did the same act without the consent of the licensed officers, he would be a trespasser. Therefore, if it is legally possible for the libellant to have been an invitee of the respondent, he should allege facts showing that he was at the place of the accident as an invitee of the respondent.

The libellant fails to allege that he was using any passageway which was designed for the purpose of affording access from or to any part of the vessel. [18]

II.

“A mere licensee takes the property on which he enters as he finds it, enjoys the license subject to its concomitant perils, and assumes all the ordinary risks incident to the condition of the property and the manner of the conduct of the owner’s business thereon. Accordingly the owner or person in charge of property is ordinarily under no duty to make or keep the property in a safe condition for the use of licensees; nor is he under any obligation to take any measures to protect mere licensees from injury due to the condition of the property, or from dangers incident to the ordinary uses to which the premises are subject. There is no duty to provide safeguards for licensees, even though there are dangerous holes, pitfalls, obstructions, or other conditions near to the part of the premises to which the permissive use extends. Neither is the owner or person in charge ordinarily under any duty to give licensees warning of concealed perils, although he might, by the exercise of reasonable care, have discovered the defect or danger which caused the injury. It follows that, as a general rule, the owner or person in charge of property is not liable for injuries to licensees due to the condition of the property, or, as it has been expressed, due to passive negligence or acts of omission. A fortiori, if licensees choose to make use of property although there is open and obvious danger thereon, the owner cannot be held liable for injury to a

licensee because of such danger. It has been said, however, that the owner is under a duty not to expose a licensee to perils which [19] could be avoided by the exercise of reasonable care. The owner has been held not liable for injuries which a mere licensee on his property has received from excavations, a trench, a ditch, a cistern, a hole in the ground, an uncovered coalhole, a steam pit, a drain used to carry away hot water, a vat of hot water, elevators, unguarded or insufficiently guarded elevator shafts, floor openings, a hole in a bridge, an opening in the platform of a fire escape, uninsulated or insufficiently insulated electric wires, stairways, scantlings or pieces of timber on the floor of a hall of an office building, lack of light in a tenement house hallway, a pile of lumber, a heap of stones, a derrick, a moving crane, log rollways, a defective farm crossing over a railroad, a defect in the roof of a barn, a wire stretched across the outer edge of a lawn to keep off trespassers, a barbed wire fence along the boundary of the premises, the fall of a gravestone in a cemetery, a fire on the premises, an explosion of gas, the breaking of a machinery belt, or failure of a servant of the owner to use reasonable care in throwing a bale of hay from a loft."

45 Corpus Juris, 798-802, sec. 203.

Disregarding, for the moment, the many adjectives used by the libellant in qualifying the alleged acts which resulted in his injury, it is clear that the physical cause of the injury was an open hatch in some part of the vessel. The reason, as stated by the libellant, for his

fall into the open hatch was that said open hatch was not illuminated so that the libellant could see said open hatch.

The libellant alleges that the vessel was docked at the time and place, for the purpose of undergoing repairs by the respondent [20] *Bethlehem Steel Corporation* (Libel, page 3, Eighth Article). He therefore had knowledge of the fact that he could not reasonably expect the vessel to be in the same condition throughout as might be the case if the same had not been withdrawn from navigation.

If, as is contended by the respondent, the libellant was at most a licensee, he must allege facts showing that the respondent committed some overt act after the libellant boarded the vessel as such licensee and that such overt act proximately caused his injury. There was no affirmative duty on the part of the respondent to perform any act such as lighting the area around the hatch. Respondent's only duty was to refrain from committing an overt act of negligence after the libellant came aboard. A licensor is entitled, under the law, to remain passive and has no affirmative duty. There is no allegation of any fact in the libel showing that the libellant notified any responsible agent of the respondent that he intended to go to the particular part of the vessel where the open hatch would be encountered. Libellant does not even allege that any agent or employee of respondent was aboard the SS "Frank G. Drum" at the time the libellant went aboard. All he says is that John One was charged with

the duty of permitting members of the Coast Guard to Board the SS "Frank G. Drum" for the purpose of making inspections of said ship and that John Five "was in charge of that certain ship which was then and there known and referred to as SS 'Frank G. Drum' hereinafter mentioned."

Respondent has already shown (14 USCA, sec. 45) that there wasn't anything the respondent could have done about keeping the libellant off of the vessel. The mere fact that John Five was in charge of the vessel does not mean that John Five was on the vessel.

Although the libellant alleges that the Tide Water Associated Oil Company was the owner and operator of the SS "Frank G. Drum" at the time of the happening of the accident this is a legal [21] impossibility. Pursuant to Executive Order No. 9054, 7 Fed. Reg. 837, as amended by Executive Order No. 9244, 7 Fed. Reg. 7327, there was established within the office for Emergency Management of the Executive Office of the President, a War Shipping Administration under the direction of an Administrator appointed by and responsible to the President. The Executive Order provides in part as follows:

"The Administrator shall perform the following functions and duties: a. Control the operation, purchase, charter, requisition, and use of all ocean vessels under the flag or control of the United States, except (1) combatant vessels of the Army, Navy, and Coast Guard; fleet auxiliaries of the Navy; and transports owned by the Army and Navy; and (2)

vessels engaged in coastwise, intercoastal, and inland transportation under the control of the Director of the Office of Defense Transportation.”

Title 50 USCA App. sec. 1295.

III.

With reference to Exceptions No. III, IV, V and VI:

The respondent contends that it is at least entitled to know the capacity in which the respondents John One, John Five and John Six were serving as agents or servants or employees. Unless the libellant is compelled to give some clue to the scope of the employment of these fictitious persons and what their duties were by alleging facts clearly showing the relationship which the libellant claims each one of these fictitious persons bore to the respondent, then it will be impossible for the respondent to prepare an answer in accordance with the requirements of general Rule 26 which states that “all answers shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, . . .” [22]

The libellant has stated his contentions with reference to John One, John Five and John Six in such a confused manner as to make it impossible to determine the identity of any one of such fictitious persons. If the libellant would allege that John One was the master of the SS “Frank G. Drum” or some other officer of said vessel or a bos’n or able bodied seaman, respondent would have some information upon which to predicate an answer. The

Court will take judicial notice of the fact that it is possible for the libellant to obtain exact information with reference to the name, address and capacity of each person who might have been on board the vessel at the time and place referred to in the libel. Libellant can obtain a copy of the Shipping Articles.

More confusion arises because of the allegations that John One was an agent, servant and employee of John Five and John Six; that John Five was an agent, servant and employee of John One and John Six; and that John Six was an agent, servant and employee of John One and John Five.

IV.

In the Tenth Article the libellant refers to checking upon guards on duty but he doesn't allege that there were any guards of any kind on board the SS "Frank G. Drum" at the time he boarded the vessel. If there were no guards on duty aboard said vessel then obviously the libellant would not be required to go aboard for the purpose of checking on any guards. His allegation that it was also his duty to make further checks on docks to verify the reports of the Coast Guardsmen on duty means nothing unless he alleges that some Coast Guardsman on duty on said vessel made some report which required the presence of the libellant. In the final analysis, it is quite clear from the law governing the Coast Guard (Title 14 USCA sec. 45) the only duty of the libellant would be to inspect the vessel for the purpose of finding out

whether there had been any [23] violation of any law of the United States.

V.

The allegation in the Eleventh Article that the libellant entered the ship for the purpose of inspecting said ship "for the benefit of the respondents herein" is a conclusion.

If any inspection made by the libellant was for the benefit of this excepting respondent, the facts should be alleged so that the Court could draw the conclusion that the inspection was for the benefit of the respondent. If we look at the allegations in the other Articles of the libel we find that libellant claims that he was checking upon guards and verifying the reports of the Coast Guardsmen on duty. These allegations show no benefit to the respondent in the sense that the benefit was one which would create the relationship of invitor and invitee.

If a fireman comes into your house to put out a fire his entry is for the benefit of the owner of the premises and also for the benefit of the neighboring houses but it is not the kind of benefit which is referred to as one of the elements which makes up the relationship of invitor and invitee. Preventing spies and saboteurs from damaging the vessel would, of course, benefit the owner of the vessel, but the obvious purpose of the activities of the libellant was to safeguard the interests of a nation at war. As a matter of law it would be impossible for a member of the armed forces of the United States to be assigned to the duty of protecting private property for

the benefit of the owner of such property. The services of the armed forces are never used for the purpose of policing private property for the benefit of the individual owner.

V.

The allegation in the Twelfth Article with reference to the activity of the respondent in so far as the repair docks are [24] concerned has no place in the libel for the reason that there is lack of any showing of proximate causal connection between anything done or omitted on the repair docks and the act of the libellant in falling into an open hatch.

Admiralty Rules of pleading require specific allegations of negligence. The libellant is evidently proceeding on the theory that the rules of pleading adopted by the State of California are applicable in Admiralty. There is no question about the fact that negligence cannot be pleaded generally in admiralty. Aside from this observation, the allegation with reference to the contention that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondents is not even a general allegation of negligence. It is an attempt to plead proximate causal connection but the rules require an allegation of fact showing a proximate causal connection between a specific negligent act and the injury. Therefore, this particular language on lines 29 to 31, page 4 of the libel, is a conclusion and therefore irrelevant and incompetent.

The language "among other particulars", line 1, page 5 of the libel, is irrelevant and incompetent for the reason that it alleges no specific act of negligence. It is also lacking in distinctness. The respondents are entitled to know before the day of trial and the introduction of evidence what the libellant claims as the basis of his suit.

The same defect exists with reference to the allegation in line 1, page 6 of the libel, that "there is negligence in other respects as will be shown upon the trial."

The only fact alleged in subdivision (f) of the Twelfth Article is that the respondents "permitted said hatch to remain open, unguarded and in a dark condition". If an open unguarded hatch, not illuminated, is a trap, then the Court can draw that conclusion itself. The libellant cannot, by a conclusion, establish [25] that an open unguarded and unilluminated hatch is a trap. A trap is something which is set for the purpose of injuring another. There is no allegation in the libel to the effect that the respondent opened the hatch and left it open for the purpose of causing the libellant to fall into it.

Respectfully submitted,

LASHER B. GALLAGHER

Proctor for Respondent, Tide Water Associated
Oil Company, a corporation [26]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Nov. 19, 1945. [27]

[Title of District Court and Cause]

ANSWER OF LIBELLANT TO EXCEPTIONS TO
LIBEL IN PERSONAM OF RESPONDENTS,
TIDE WATER ASSOCIATED OIL COMPANY,
A CORPORATION, AND BETHLEHEM STEEL
CORPORATION, A CORPORATION

I.

Insofar as Respondents' argument concerning fictitious defendants is concerned, Libellant feels that they are sufficiently described in the Libel and sufficiency identified and submits that point for the consideration of the Court without further argument.

II.

Insofar as the allegations of negligence are concerned, the Court's attention is respectfully called to pages 4, 5, and 6 of the Libel, and particularly to page 5 where seven specific acts of negligence are set forth in detail. In this respect Libellant desires to call the Court's attention to the case of Jolivel vs. City of Seattle, D. C. Wash. 1915, 226 F. 963 which holds that a Libel alleging with reasonable certainty the essential facts showing a legal duty, a default therein, and a resultant injury of which it is the proximate cause is sufficient. [28]

In fact the cases have gone so far as to hold that there is no rigid rule which prevents Libellant alleging one fault recovering on proof of a different fault. Libellant may rely upon improper speed in fog shown by defendant's evidence, although he alleged only improper steering. The Cambridge, D. C. Mass. 1871, Fed. case No. 2334. Complaint was made of the fact that Libellant in his Libel stated "There is negligence in other respects as will be

shown upon the trial.” The Court is well aware of the rule that a Libellant may amend to conform to proof and this allegation was placed in the Libel to preserve his rights in the event it became necessary to amend the Libel at the time of trial to conform to proof.

Libellant contends that the Respondents have been specifically and fully informed of the acts of negligence and that the Libel is sufficient in this respect.

III.

Apparently the main basis of the exceptions of both Respondents is the contention that Libellant was a licensee and not an invitee. In support of their contention in this respect, they quoted at length from *Corpus Juris* and cite ~~the said~~ cases involving policemen and firemen who had responded to an emergency call and accordingly were held to be mere licensees. Such is not the situation in the case at bar. In fact some jurisdictions have held that firemen are invitees. In this respect the Court’s attention is called to 38 Am. Jur. Page 785, paragraph 125 which states in part as follows:

“According to some authority, an owner of property is under obligation to make his premises reasonably safe for a fireman coming thereon in the discharge of his duty, and can be held liable for an injury sustained by a fireman as a result of some defect in the premises which could have been remedied in the exercise of reasonable [29] care . . .” *Meiers v. Fred Koch Brewery*, 229 NY 10, 127 NE 491, 13 ALR 633.

Other jurisdictions hold that policemen and firemen coming on premises in line of their duties as such act in

an emergency and therefore are mere licensees and not invitees. The question of whether one acted in an emergency or not seems to be the distinguishing factor where they hold policemen and firemen are licensees.

The rule seems to be set forth quite clearly in 38 Am. Jur. Page 784 at paragraph 123:

“Sec. 123. Public Officers—The decisions appear to be somewhat indefinite with respect to the status of public officers who enter upon premises in the discharge of duties imposed upon them by law. Some cases seem to warrant the statement that they are to be deemed, so far as the liability of the owner or occupant for negligence is concerned, not trespassers or licensees, but persons rightfully on the property. On the other hand, it has been asserted that at common law the occupier of premises is not under a duty of active diligence to protect from harm a person who enters on the premises under a license given by the law. It seems probable that no very general principle can be formulated, the cases being governed largely by their facts and surroundings. A distinction suggests itself, however, between officers who go upon property in the regular course of the business conducted thereon, whose presence may be deemed to be contemplated and known to the owner or occupant, and those public officers who enter not under any prearranged scheme, but as the result of extraordinary and unforeseen circumstances. Officials [30] of the former class may be deemed to come on the premises by invitation, whereas those of the latter description properly may be considered no more than licensees. At any rate, officers performing prescribed

and regular duties which require them to visit premises at regular intervals, such as engineers and inspectors, have been held to enjoy the status of persons entering by invitation." . . .

In this respect the Court's attention is called to Article Tenth, page 4 of the Libel, and particularly the last portion thereof, and also Article Twelfth, page 5, paragraph (g) thereof.

There are numerous cases involving this very point in California. The case of *Wilson vs. Union Iron Works*, 167 Cal. 539 was a case where a United States Inspector of Customs on the morning of the accident had a duty to board the steamer "Mongolia" at Pier 44 and stay on board the ship until it reached defendant's drydock. When the gangplank was made fast it was his further duty to go down first and allow no one to precede him so that other custom officers who were waiting for his arrival at the foot of the plank could go aboard the ship and immediately search the passengers for dutiable articles before anyone left the ship. While descending the plank it broke due to a defect. Under this set of facts the defendant claimed that plaintiff was merely a licensee at most and owed him only that duty which was owing to a licensee.

The Court held "Under these circumstances it is clear that the defendant owed to all persons lawfully and properly on board such vessel on arrival at the dock and there wishing to leave it, the duty of providing a safe and sound gangplank for their use."

.

"It was, at all events, bound to exercise reasonable and ordinary care for the safe carriage of those

whom it had reason [31] to expect would avail themselves of that means of leaving the vessel."

"The plaintiff stood in a relation to the defendant which made this duty owing to him. He was aboard the vessel and left it over this gangplank in the performance of his duty, a duty which was usually performed by custom house officers in such cases and of which it is to be inferred the defendant had notice."

In the case of "The City of Naples," *Gilchrist et al vs. Naples*, 69 Fed. Rep. 794, the Libellant was a grain inspector and while in discharge of his official duty of inspecting the vessel preparatory to shipping a cargo of grain, he fell down a dark and unguarded hatchway. He testified he was following the direction pointed out to him by the captain; he testified that the lower deck was lighted only by two candles which were at a considerable distance from the hatchway into which he fell and which was invisible in the dark. The Court held "The Libellant was not on the vessel as a mere licensee. He was there in the discharge of an official duty in which the vessel itself had an interest for it could not receive its cargo until it had been inspected. The right and duty of the Libellant to inspect the vessel did not authorize him to take command of her or to give orders to her crew to prepare her for inspection or to light up the vessel for that purpose."

The case of *Law vs. Grand Trunk Ry. Co.*, 72 Maine 313, held that the owner of a wharf where foreign laden vessels discharge, are liable to custom officers who are required to visit the premises in the performance of their duties for personal injuries received while in the exercise of due care because of the unsafe or unsuitable condition of the wharf. It further held that a custom officer whose

duty is to watch for smugglers and prevent smuggling may be in the exercise of due care when in the course of his duty he passes over a wharf where a foreign laden vessel is lying in the night time and without a lantern.

In the case of *Tobin vs. P. S. & P. R. Co.*, 59 Maine 183, it [32] was held that a railway corporation is liable to a hackman for an injury received while carrying a passenger to their depot for transportation, by stepping, without fault, into a cavity in their platform, and occasioned solely by the want of ordinary care on the part of the corporation in leaving their platform in an unsafe condition.

The Court's attention is specifically called to the case of *Christy v. Ulrich et al*, 113 Cal. App. 138; 298 Pac. Rep. page 135. This was a case where the plaintiff was acting under the employment of the State of California as a resident engineer in charge of the construction of a state highway bridge. The bridge was being constructed under contract by the defendant, Ulrich. The duties of the plaintiff were to inspect the work under construction. Plaintiff was watching the progress of the workmen in pouring and tamping concrete. The tamper happened to break and one of the workmen said there was another tamper on a cross-runway at "Bent 2."

Plaintiff volunteered to get this tamper for the workmen. He walked along the main runway to the cross-runway at "bent 2," picked up the tamper and returned to the main runway, where one of the planks upon which he stepped gave way and precipitated him into the creek bed causing the injuries complained of.

The defendants insisted the plaintiff was a mere licensee to whom they owed no duty except to abstain from willful

and wanton negligence. In this respect the Court stated as follows:

“The respondent was not a mere licensee. The work was being performed upon a public highway right of way; the respondent was a state employee assigned to the highway division of the state department of public works; his duties, at the time of the accident, were to inspect the work under construction; and, for this purpose, it was necessary for him to go upon the scaffolding and other portions of the work as it progressed. Immediately preceding [33] the accident, he was inspecting the pouring of concrete in “Bent No. 3.” He saw that the tamper was broken and that the tamping of the concrete was not being done properly. He volunteered to get the workmen another tamper, and was injured while returning with that implement. In this he may have been acting outside the scope of his employment, but it must be remembered that he is not suing his employer in this action for injuries caused during the course of employment. He is resting his case on the negligence of the contractor. It is conceded that it was his duty to inspect all portions of the work, and the fact that he was voluntarily carrying a tool to the workmen while passing over the main runway does not alter his status as an invitee.”

The Court further stated “He was not on that runway upon any private business of his own or from mere curiosity or in violation of orders of spections. He was there because his duties required him to be there. The fact that at the moment of the accident he was carrying a tool to the workmen does not change the status because this was in aid of the duties he had to perform.”

Certainly the foregoing cases are analogous to the case at bar and they show conclusively that Libellant at the time of his accident was not a mere licensee but was an invitee and as such the respondent owed him at least ordinary care.

One of the Respondents raises in its exceptions Executive Order No. 9054, 7 Fed. Reg. 837 as amended by Executive Order No. 9244, 7 Fed. Reg. 7327. Certainly if there is anything to Respondent's point in this connection, it would at most be a special defense to be pleaded in its answer and not be raised by way of exceptions. In fact the evidence in this case will show that at the time of the accident, to-wit: August 6, 1944, Tide Water Associated Oil Company, a corporation, was the owner and operator of [34] the said vessel "SS Frank G. Drum" and that the War Shipping Administration did not take over the operations of said vessel until sometime subsequent to the happening of the accident.

Wherefore Libellant prays that the exceptions of both Respondents be disallowed and that they be directed to answer Libellant's Libel forthwith.

Respectfully submitted,

GAINES HON and
IRVING FEINTECH

By Gaines Hon

Proctors for Libellant [35]

Received copy of the within Answer of Libellant to Exceptions, etc., this 12th day of December, 1945. Lasher B. Gallagher for Resp. Asso. Oil Co.

Received copy of the within Answer of Libellant to Exceptions this 12th day of December, 1945. Lillick, Geary, McHose & Adams for Resp. Bethlehem Steel Co.

[Endorsed]: Filed Dec. 12, 1945. [36]

[Minutes: Monday, December 24, 1945]

Present: The Honorable Harry A. Hollzer, District Judge.

This cause coming on for hearing on exceptions to the libel;

It is ordered that the said matter stand submitted on the briefs heretofore filed. [37]

[Minutes: Wednesday, March 13, 1946]

Present: The Honorable Leon R. Yankwich, District Judge.

Good cause appearing therefor, it is ordered that the submission of the Exceptions of Respondent Tide Water Associated Oil Co. to the Libel, and the Exceptions of Respondent Bethlehem Steel Company (sued as Bethlehem Steel Corporation), to the Libel, be and hereby is vacated; and it is further ordered that this cause is placed on the calendar for hearing said Exceptions on Tuesday, March 19, 1946, at 10 A. M., before the Honorable Charles C. Cavanah. [38]

[Minutes: Tuesday, March 19, 1946]

Present: The Honorable Charles C. Cavanah, District Judge.

This cause coming on for hearing (1) Exceptions of Respondent Tide Water Associated Oil Co. to Libel, filed Nov. 19, 1945; (2) Exceptions of Respondent Bethlehem Steel Company (sued as Bethlehem Steel Corporation) to Libel, filed November 30, 1945; Irving Feintech and Gaines Hon, Esqs., appearing as proctors for the libelant; Lasher B. Gallagher, Esq., appearing as proctor for the respondent Tide Water Associated Oil Co.; and Messrs. Lillick, Geary, McHose, and Adams, by John C. McHose, Esq., appearing as counsel for the respondent Bethlehem Steel Co.:

Attorney Gallagher argues in behalf of respondent Tide Water Associated Oil Co.; Attorney McHose argues in behalf of respondent Bethlehem Steel Co.; Attorney Hon argues in behalf of the libelant; and Attorney Gallagher argues in reply. The Court makes a statement of its views and it is ordered that the exceptions to the libel be overruled as to both respondents, and it is further ordered that respondents are allowed twenty days to file answer to the libel.

Exception to the Court's ruling is taken by both respondents and allowed by the Court. Notice of ruling is waived. [39]

[Title of District Court and Cause]

ANSWER OF RESPONDENT BETHLEHEM
STEEL COMPANY, A CORPORATION

Comes now Bethlehem Steel Company, a corporation of the State of Pennsylvania, sued herein as Bethlehem Steel Corporation, a corporation, and answering the libel and complaint herein admits, denies, and alleges as follows:

I.

Answering Article First, admits that Bethlehem Steel Corporation, a corporation, is a corporation organized JCMc LBF Pennsylvania and existing under the laws of the State of Delaware, but denies that Bethlehem Steel Corporation is authorized to, or does, transact business in the State of California. Alleges that Bethlehem Steel Company, a corporation, is a corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and is [40] authorized to and does transact business in the State of California.

II.

Answering the allegations of Articles Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh and Seventeenth, alleges that this respondent has no knowledge, information or belief sufficient to enable it to answer said Articles, or any of them, and, basing its denial upon that ground, denies each and every, all and singular, generally and specifically said allegations.

III.

Answering the allegations of Article Eighth. this respondent admits that that certain ship known as S. S.

"Frank G. Drum" was on April 6, 1944, on navigable waters of the United States, at the repair docks of this respondent at Terminal Island, Los Angeles Harbor, State of California, for the purpose of undergoing repairs by this respondent. Alleges that this respondent is without sufficient information or belief to enable it to answer the allegation that the respondent, Tide Water Associated Oil Company, a corporation, and John Four were the owners and operators of the S. S. "Frank G. Drum," and, placing its denial upon that ground, denies said allegations. Denies each and every, all and singular, generally and specifically all other allegations contained in Article Eighth.

IV.

Answering the allegations of Articles Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth, this respondent denies each and every, all and singular, generally and specifically said allegations.

V.

Answering the allegations of Article Eighteenth, this [41] respondent admits that the S. S. "Frank G. Drum" has been within the district and jurisdiction of this Court during the pendency of the libel.

VI.

Answering the allegations of Article Nineteenth, this respondent denies that all and singular or all or singular the premises are true but admits that if true they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

VII.

Answering the allegations of Article Twentieth, this respondent denies that respondent, Bethlehem Steel Corporation, a corporation, was or is transacting business in the State of California or within the jurisdiction of this Honorable Court, but admits as aforesaid that Bethlehem Steel Company, a corporation, was and is transacting business in the State of California.

For a Further and First Affirmative Defense, This Answering Respondent Alleges:

I.

That the accident or occurrence mentioned in the libel and complaint and whatever damage or injury, if any, has been sustained by libelant by reason thereof were the result of inevitable and unavoidable accident so far as this respondent is concerned.

For a Further and Second Affirmative Defense, This Answering Respondent Alleges:

I.

That the accident or occurrence mentioned in the libel and complaint and whatever damage or injury, if any, has been sustained by libelant by reason thereof were caused and resulted [42] solely by reason of the negligence of libelant, and not by reason of any negligence on the part of this respondent.

For a Further and Third Affirmative Defense, This Answering Respondent Alleges:

I.

The libelant fails to state a claim against this respondent upon which relief can be granted.

For a Further and Fourth Affirmative Defense, This Answering Respondent Alleges:

I.

Upon information and belief that at all times referred to in the libel and complaint libelant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions being employed and used aboard vessels of the type of the S. S. "Frank G. Drum"; upon information and belief that at the time of the accident alleged in the libel and complaint, the risks and dangers incident to the work in which libelant was engaged and the risks and dangers incident to the manner in which libelant was performing said work, and the risks and dangers then existing at the place of the alleged accident, including the risk and danger of personal injury of the nature and in the manner suffered or alleged to have been suffered by the libelant, were open, obvious, apparent and well known to libelant and were fully appreciated by him or should have been fully appreciated by a man of his experience and calling.

II.

Upon information and belief that despite and contrary to his knowledge, experience and familiarity as aforesaid, libelant [43] carelessly, negligently, recklessly, voluntarily and unnecessarily placed himself in a position where he was exposed to the risk and danger of injury of the

nature that occurred or was alleged to have occurred to libelant; upon information and belief that libelant was negligent in and about the premises in other respects concerning which this respondent is not now advised but which respondent begs leave to offer proof of as and when advised and to amend this answer accordingly.

III.

Upon information and belief that the injuries suffered by libelant, or alleged to have been suffered by libelant, if any, were solely and proximately caused by libelant's recklessness, carelessness and negligence as aforesaid.

For a Further and Fifth Affirmative Defense, This Answering Respondent Alleges:

I.

Refers to and incorporates herein as if fully set forth all the allegations contained in Articles I and II of the Fourth Affirmative Defense hereinabove.

II.

Denies as aforesaid that this respondent was negligent either as alleged in the libel and complaint or otherwise or at all but alleges upon information and belief that if this respondent was negligent in any respect and if such negligence was a proximate or contributing cause of the alleged injuries, if any, nevertheless said injuries were proximately caused and contributed to by libelant's own recklessness, carelessness and negligence as aforesaid.

III.

Refers to and incorporates herein as if fully set forth [44] all the allegations contained in Articles I and II of the Fourth Affirmative Defense hereinabove.

IV.

Alleges that by reason of the premises and the foregoing libelant assumed the risks and dangers aforesaid and the risk and danger of all injuries suffered by libelant, if any.

Wherefore, respondent prays that the libel of the libelant be dismissed; that it have and recover its costs of suit herein, and for such other and further relief as the Court may deem proper.

Dated: March 20, 1946.

LILLICK, GEARY, McHOSE & ADAMS
JOHN C. McHOSE

Attorneys for Respondent, Bethlehem Steel Company,
a corporation [45]

[Verified.] [46]

Received Apr. 11, 1945. Hon and Jarrett, M.R., Attorney for Plaintiff.

Received copy of the within Answer this 11th day of April, 1946. Lasher B. Gallagher, Attorney for Tide Water Asso. Oil Co.

[Endorsed]: Filed Apr. 12, 1946. [47]

[Title of District Court and Cause]

ANSWER OF RESPONDENT TIDE WATER ASSOCIATED OIL COMPANY, A CORPORATION

Comes now Respondent Tide Water Associated Oil Company, a corporation, and answers the libel herein as follows:

I.

Admits the allegations of the First and Second Articles.

II.

Respondent has no information or belief with reference to the identities or the capabilities of any of the individuals, associates, corporations or other entities referred to or meant to be referred to by the libellant by the fictitious designations John One, John Two, John Three, John Four, John Five or John Six in the Third and Fourth Articles and has no information or belief upon the subject sufficient to enable it to answer the allegations set forth in the Third, Fourth, Fifth, Sixth and Seventh Articles and [48] placing its denial thereof upon said ground denies said allegations and each thereof, generally and specifically.

III.

Answering the allegations of the Eighth Article, this respondent admits that it was the owner of the SS "Frank G. Drum" and that said vessel was at the repair docks of the Bethlehem Steel Corporation, a corporation, at all times mentioned in the libel and that it was docked at said location at said time and place for the purpose of undergoing repairs by the Bethlehem Steel Corporation, a corporation.

Further answering the allegations of the Eighth Article, respondent alleges that at all times referred to in the libel the said vessel was under requisition charter to the United States of America and that at all times mentioned in the libel said vessel had been withdrawn from navigation and that all of the engine room facilities, including those designed and actually in the vessel for the purpose of generating electricity, were and each thereof had been shut down. Respondent further alleges that the said vessel, at all times mentioned in the libel, was an ocean-vessel under the Flag or control of the United States and that the sole and exclusive right to control the operation, charter, requisition or use thereof was the prerogative of the Administrator, War Shipping Administration, as provided in and by Executive Order No. 9054, 7 Federal Register, 837, as amended by Executive Order No. 9244, 7 Federal Register, 7327, and that at none of the times or places referred to in the libel did this respondent have the right to control the operation or charter or requisition or use of said vessel.

IV.

Respondent admits the allegations of the Ninth Article.

V.

Respondent has no information or belief upon the subject sufficient to enable it to answer the allegations set forth in the [49] Tenth Article, excepting that portion thereof which might include this respondent from and including the last semicolon in said Tenth Article, and placing its denial thereof upon said ground, denies said allegations and each thereof.

With reference to the allegation "that at said time and place the Respondents knew or in the exercise of ordinary

care should have known all of the duties of Libellant as above set forth" this respondent, for itself alone and not for any other respondent, denies said disjunctive allegation and each part thereof.

VI.

Answering the allegations of the Eleventh Article, this respondent denies that the libellant entered said vessel for the benefit of this respondent.

With reference to the balance of the allegations in the Eleventh Article, this respondent has no information or belief upon the subject sufficient to enable it to answer the same and placing its denial thereof upon said ground denies said allegations and each thereof.

Respondent specifically denies that the libellant was an invitee of this respondent.

With further reference to the status of the libellant, respondent is informed and believes and therefore alleges that the libellant was not at any time referred to in said libel a commissioned or warrant or petty officer of the Coast Guard.

VII.

Answering the allegations of the Twelfth Article, this respondent admits that there was no artificial illumination at or near the place where the libellant sustained his injury unless the libellant possessed a flashlight or spotlight or lantern or some other means of illumination. [50]

With reference to the remaining allegations and each thereof set forth in the Twelfth Article, respondent denies said allegations and each thereof and in this connection specifically denies that it caused or permitted the hatch to the bumper of said vessel to remain open or unguarded

or in a dark condition and denies that it maintained the said hatch in an open or unguarded or dark condition and denies that the accident complained of was entirely or at all due to any incompetency or fault or negligence or carelessness or unlawfulness of this respondent or that there was any incompetency or fault or negligence or carelessness or unlawfulness on the part of this respondent and denies that this respondent is liable for damage, if any, because of any fault on the part of this respondent or otherwise and denies that this respondent was at all at fault in any respect.

VIII.

Answering the allegations of the Thirteenth Article, this respondent denies that it invited or permitted libellant onto said vessel and denies each and every allegations set forth in said Thirteenth Article.

IX.

Answering the allegations of the Fourteenth Article, respondent admits that libellant did sustain some injury, the extent of which is not known to respondent, but denies the remaining allegations and each thereof in said Fourteenth Article and denies that libellant has been damaged in the sum of \$45,000.00, or in any other sum whatsoever or at all.

X.

Answering the allegations of the Fifteenth Article, respondent admits that the libellant was confined to the United States Naval Hospital in Long Beach and to the Naval Convalescent Hospital in San Bernardino, but has no information or belief upon the subject as to the length of each confinement or with reference to [51] the physical

ability or condition of the libellant and placing its denial thereof upon said ground denies said allegations and each thereof. Respondent specifically denies that any of the matters or things referred to in the Fifteenth Article occurred or took place or existed as a result of any negligence on the part of this respondent either as alleged or otherwise or at all.

XI.

Answering the allegations of the Sixteenth Article, this respondent denies that any of the matters or things therein referred to occurred, took place or existed as a result of any negligence on the part of this respondent. With reference to the allegations stating the condition of libellant's right leg, this respondent has no information or belief upon the subject sufficient to enable it to answer said allegations and placing its denial thereof upon said ground denies said allegations and each thereof.

XII.

Respondent has no information or belief upon the subject sufficient to enable it to answer the allegations or any thereof set forth in the Seventeenth Article and placing its denial thereof upon said ground denies said allegations and each thereof and denies that libellant has been damaged in the sum of \$25,000.00, or in any other sum whatsoever or at all.

XIII.

Answering the allegations of the Eighteenth Article, respondent admits that the SS "Frank G. Drum" has been within the district and jurisdiction of this Court during the pendency of the libel.

XIV.

Answering the allegations of the Nineteenth Article, this respondent denies that all or singular the premises are true or that any premise is true excepting as hereinabove specifically admitted or alleged but admits that the premises are within the Admiralty and [52] Maritime Jurisdiction of this Honorable Court.

XV.

Answering the allegations of the Twentieth Article, this respondent for itself admits that at all times mentioned in the libel this respondent was and still is transacting business in the State of California but by this admission does not admit that at the time or place of the happening of the accident or with reference to the presence of the libellant on board the said SS "Frank G. Drum" this respondent was transacting any business whatsoever or that the presence of the libellant aboard said vessel had the slightest connection with any business being transacted by this respondent.

For a Further and First Affirmative Defense, Respondent Alleges:

I.

That the accident or occurrence mentioned in the libel and whatever damage or injury, if any, has been sustained by libellant by reason thereof were the result of inevitable and unavoidable accident so far as this respondent is concerned.

For a Further and Second Affirmative Defense, Respondent Alleges:

I.

That the accident or occurrence mentioned in said libel and whatever damage or injury, if any, has been sustained by libellant by reason thereof were caused and resulted solely by reason of the negligence of libellant and not by reason of any negligence on the part of this respondent.

For a Further and Third Affirmative Defense, Respondent Alleges:

I.

Upon information and belief that at all times referred to [53] in the libel, libellant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions being employed and used aboard vessels of the type of the SS "Frank G. Drum"; upon information and belief that at the time of the accident alleged in the libel the risks and dangers incident to the work in which libellant was engaged and the risks and dangers incident to the manner in which libellant was performing said work, and the risks and dangers then existing at the place of the alleged accident. including the risk and danger of personal injury of the nature and in the manner suffered or alleged to have been suffered by the libellant, were

open, obvious, apparent and well known to libellant and were fully appreciated by him or should have been fully appreciated by a man of his experience and calling.

II.

Upon information and belief that despite and contrary to his knowledge, experience and familiarity as aforesaid, libellant carelessly, negligently, recklessly, voluntarily and unnecessarily placed himself in a position where he was exposed to the risk and danger of injury of the nature that occurred or was alleged to have occurred to libellant; upon information and belief that libellant was negligent in and about the premises in other respects concerning which this respondent is not now advised but which respondent begs leave to offer proof of as and when advised and to amend this answer accordingly.

III.

Upon information and belief that the injuries suffered by libellant, or alleged to have been suffered by libellant, if any, were solely and proximately caused by libellant's recklessness, carelessness and negligence as aforesaid. [54]

For a Further and Fourth Affirmative Defense, Respondent Alleges:

I.

Refers to and incorporates herein as if fully set forth all the allegations contained in Articles I and II of the Third Affirmative Defense hereinabove.

II.

Denies as aforesaid that this respondent was negligent either as alleged in the libel or otherwise or at all but alleges upon information and belief that if this respondent was negligent in any respect and if such negligence was a proximate or contributing cause of the alleged injuries, if any, nevertheless said injuries were proximately caused and contributed to by libellant's own recklessness, carelessness and negligence as aforesaid.

III.

Alleges that by reason of the premises and the foregoing libellant assumed the risks and dangers aforesaid and the risk and danger of all injuries suffered by libellant, if any.

Wherefore, respondent prays that the libel of the libellant be dismissed; that it have and recover its costs of suit herein, and for such other and further relief as the Court may deem proper.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation [55]

[Verified.] [56]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Apr. 29, 1946. [57]

[Title of District Court and Cause]

SPECIAL INTERROGATORIES

Special Interrogatories Addressed to Respondent Tidewater Associated Oil Company:

As used in the questions that follow, "standby crew" refers to those members of the ship's company of the "S. S. Frank G. Drum" who had duties to perform in behalf of the ship while she was in a repair status at the repair docks of the Bethlehem Steel Company, and/or who were living aboard the vessel at that time. "Repair crew" refers to those employes of the Bethlehem Steel Company who were engaged in repairing the "S. S. Frank G. Drum" while she was in a repair status.

1. Were the members of the standby crew employes of, and paid by the Tidewater Associated Oil Company?

2. What is the name, rank or rating at the time of the accident, and last known address of each member of the standby crew?

3. Which of the persons mentioned in question 2 were actually on duty aboard the "S. S. Frank G. Drum" at 2100 on [58] August 6, 1944?

4. Who was the Captain of the "S. S. Frank G. Drum" on August 6, 1944 and what is his last known address?

5. Who was in command of the "S. S. Frank G. Drum" on August 6, 1944?

6. What were the duties of each individual member of the standby crew while the "S. S. Frank G. Drum" was at the Bethlehem Steel Company's Repair Yards?

7. Were any members of the standby crew to inspect the ship for any reason while it was in a repair status?

8. If the answer to the preceding question is "No," then, who was to inspect the vessel for fire hazards, leaks, sabotage, etc.?

9. Did any members of the standby crew have the responsibility of seeing to it that the bunker hatches were properly secured? If not, please explain in detail why it wasn't their responsibility?

10. If the answer to the first part of the preceding question is "No," whose duty was it to see to it that the bunker hatches were properly secured?

11. Was the nature of the repairs being made on the "S. S. Frank G. Drum" such that the bunker hatch into which Richardson fell had to be uncovered on the evening of August 6, 1944?

12. If the repair crew of the Bethlehem Steel Company had uncovered a bunker hatch or other hold for any reason, was it the duty of any member of the standby crew to see to it that such bunker hatch or hold was covered, or roped off and lighted, or some other precautionary measure taken at the end of the working day? If not, who had the duty to take appropriate security measures?

13. Why was the bunker hatch into which Richardson fell open and uncovered at 2100 on August 6, 1944?

14. Why was the bunker hatch into which Richardson fell unlighted at 2100 on August 6, 1944? [59]

15. Why was the bunker hatch into which Richardson fell unguarded or not roped off at 2100 on August 6, 1944?

16. When the "S. S. Frank G. Drum" was at the Bethlehem Steel Company's Repair Yards, was there a

fixed time of day at which all hatches, not being worked in, were to be secured?

17. Was it customary for the ship's crew to leave a bunker hatch uncovered, unlighted, unguarded, and not roped off at night?

18. Were there any fixed lights on the "S. S. Frank G. Drum" that could have been used to illuminate the bunker hatch or surrounding deck area where Richardson fell?

19. Did the ship have any portable lights that could have been used for this purpose?

20. If the answer to the preceding question is "No," were such lights available at the Bethlehem Steel Company's Repair Yards?

21. Where were the members of the standby crew at the time the accident in question occurred?

22. Was there any requirement or regulation in effect on August 6, 1944 that some member of the ship's crew should be stationed at or near the gang plank at all times?

23. Was there a member of the ship's crew stationed at or near the gangplank at 2105 on August 6, 1944?

24. Did the Tidewater Associated Oil Company know that the "S. S. Frank G. Drum" would be inspected by the United States Coast Guard while she was tied up at the repair docks?

25. If the answer to the preceding question is "Yes," did the Tidewater Associated Oil Company know that in making such inspections the Coast Guardsmen making the inspection could inspect the entire ship from stem to stern?

26. Had the members of the standby crew been told that the United States Coast Guard might inspect the "S. S. Frank G. Drum" while it was tied up at the repair docks? [60]

27. Had the "S. S. Frank G. Drum" ever been inspected by any members of the United States Coast Guard during the war prior to this accident?

28. If the answer to the preceding question is "Yes," had these inspections always been made by a Coast Guardsman of at least petty officer rating or by a detail under the immediate command of a Coast Guardsman of such rating?

29. Had the members of the ship's crew ever been told that a Coast Guardsman with a rating lower than petty officer was not authorized to board the vessel alone?

30. Did the Tidewater Associated Oil Company ever challenge the right of a Coast Guardsman of less than petty officer rating to board the "S. S. Frank G. Drum"?

31. Did the Tidewater Associated Oil Company ever take any steps to keep Coast Guardsmen of less than petty-officer rating off the "S. S. Frank G. Drum"?

32. Did the Tidewater Associated Oil Company ever protest to the Coast Guard authorities about Coast Guardsmen of less than petty officer rating boarding the "S. S. Frank G. Drum" unaccompanied by commissioned or petty officers? If so, please give the details.

33. Did a member of the ship's crew make a report of this accident to the Tidewater Associated Oil Company? If so, who?

34. If the answer to the preceding question is "No," did anybody make a report of this accident to the Tide-water Associated Oil Company? If so, who?

GAINES HON and
IRVING FEINTECH

By Gaines Hon

Attorneys for Libellant [61]

Received copy of the within interrogatories this 7 day of November, 1946. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

[Endorsed]: Filed Nov. 8, 1946. [62]

[Minutes: Friday, October 18, 1946]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for (1) pre-trial hearing, and (2) for setting for trial; Gaines Hon and Robert M. Newell, Esqs., appearing as proctor for the libellant; Messrs. Lillick, Geary, McHose and Adams, by John C. McHose, Esq., appearing as proctor for the Bethlehem Steel Corporation; Lasher B. Gallagher, Esq., appearing as proctor for the Tide Water Associated Oil Company; and both sides answering ready, respective counsel and the Court discuss the questions of law and fact involved herein. Counsel state that there does not appear to be any matter which can be covered by a formal pre-trial stipulation and order, and the Court, therefore, does not require counsel to prepare such document.

It is ordered that this cause be, and it hereby is, continued to 10 A. M., November 4, 1946, for setting for trial. [63]

[Title of District Court and Cause]

SPECIAL INTERROGATORIES

Special Interrogatories Addressed to Respondent Bethlehem Steel Company:

As used in the questions that follow, "standby crew" refers to those members of the ship's company of the "S. S. Frank G. Drum" who had duties to perform in behalf of the ship while she was in a repair status at the repair docks of the Bethlehem Steel Company, and/or who were living aboard the vessel at that time. "Repair Crew" refers to those employes of the Bethlehem Steel Company who were engaged in repairing the "S. S. Frank G. Drum" while she was in a repair status.

1. Had a repair crew or any other employes of the Bethlehem Steel Company worked on the "S. S. Frank G. Drum" on August 6, 1944? If not, when was the last time such persons had worked on the vessel? [64]

2. What is the name and last known address of the man in charge of the repair crew on the "S. S. Frank G. Drum" on August 6, 1944, or the last repair crew to work on the ship, if no repair crew was working on August 6, 1944?

3. What is the name and last known address of the superintendent in charge of the repair crew referred to in the preceding question?

4. What are the names and last known addresses of the watchmen who were on duty at the entrance to

Bethlehem Steel Company's Repair Yards through which Richardson entered the yards and the watchman who was stationed at the foot of the gangplank of the "S. S. Frank G. Drum" at 2100 on August 6, 1944?

5. Are any of the aforementioned individuals presently employed by Bethlehem Steel Company? If so, what are their names and present addresses?

6. How many men were there in the last repair crew on board the "S. S. Frank G. Drum" prior to 2100 on August 6, 1944?

7. Was the nature of the repairs being made on the "S. S. Frank G. Drum" at the time this accident occurred such that the bunker hatch into which Richardson fell had to be uncovered while the repair crew was actually at work?

8. If the answer to the preceding question is "Yes," was there any reason why the bunker hatch could not have been covered or roped off and lighted or otherwise guarded at the end of the last working day immediately preceding the accident in question?

9. Were the members of the repair crew instructed to cover any hatches at the end of the working day, or, if it was decided by the foreman or some other responsible person that a hatch should be left uncovered, what was the repair crew instructed to do to warn others of this condition?

10. At the time this accident occurred, was there a fixed time of day at which all hatches not being worked in were to be secured [65]

11. Why was the hatch into which Richardson fell left uncovered on the evening of August 6, 1944?

12. Why was the hatch into which Richardson fell unlighted on the evening of August 6, 1944?

13. Why was the hatch into which Richardson fell unguarded on the evening of August 6, 1944?

14. It has been stipulated that the Bethlehem Steel Company provided electric power for the ship while it was in a repair status. Did the Bethlehem Steel Company have the right to turn on any of the ship's lights that lighted the deck while the vessel was in a repair status?

15. Did the Bethlehem Steel Company have the right to install and turn on portable or temporary lights to illuminate the deck of the "S. S. Frank G. Drum"?

16. Did the Bethlehem Steel Company have any extension lights or other suitable lighting equipment that could have been used to light the deck of the "S. S. Frank G. Drum" on the evening of August 6, 1944?

17. If the answer to the preceding question is "Yes," would such equipment have been furnished to the "S. S. Frank G. Drum" upon the request of a proper member of the ship's crew?

18. Was it the duty of the civilian guards at the entrance to the Bethlehem Yards to keep any unauthorized persons out of the yards?

19. Was it the duty of Bethlehem's civilian guard to keep any trespassers or other unauthorized persons from boarding the "S. S. Frank G. Drum"?

20. If the answer to the preceding question is "Yes," were such guards instructed that Coast Guardsmen with a rating of less than petty officer were not to board any vessel in the repair yard for purposes of inspection unless accompanied by such officer?

21. At the time this accident occurred, did the Bethlehem [66] Steel Company know that the Coast Guard would inspect ships tied up at the repair docks?

22. Did the Bethlehem Steel Company know that in making such inspections, the Coast Guardsmen had the right to inspect the entire vessel from stem to stern?

GAINES HON and
IRVING FEINTECH

By Gaines Hon

Attorneys for Libellant [67]

Receipt of copy of the within instrument is acknowledged this 7 day of Nov., 1946. Lillick, Geary, McHose & Adams, by M. Brasack.

[Endorsed]: Filed Nov. 8, 1946. [68]

[Title of District Court and Cause]

ANSWERS OF RESPONDENT, BETHLEHEM
STEEL COMPANY, TO SPECIAL INTER-
ROGATORIES

1. No. August 5, 1944 about three p. m.
2. Various types of work were in progress, such as welding, riveting, pipefitting, shipfitting, etc. Different men were in charge of each group of repair men.
3. W. J. Courtiour, c/o Bethlehem Steel Company, Shipbuilding Division, San Pedro, California.
4. Harold J. Halse, 647 West 5th Street, San Pedro; Donald Johnson, c/o Ex-Marine Guards Co., 501 Bay View, Wilmington.
5. No.
6. It is impossible to answer this question. Time records show that approximately 192 men were employed in connection with the repairs being made on August 5, 1944. Some [69] of these men were engaged in work in the shop; others on board the ship. We do not know and cannot determine the exact number on board.
7. Yes. The only means of ingress and egress and ventilation to the bunker tank in which plate work was being done.
8. This would be a matter within the control of the Frank G. Drum.
9. No. This also is in the control of the ship.
10. Not to our knowledge.
11. Do not know, as this was within the ship's control. However, it is our understanding it is quite customary to leave hatches uncovered for ventilation or other reasons.

12. Do not know, as this was within the ship's control. However, we do not believe it is customary to light the decks of tankers at night.

13. Do not know, as this was within the ship's control. However, we do not understand that it is customary to provide guards for such purposes.

14. No. Electric power was furnished for ship's use as requested by ship's officers.

15. Yes, but only when and where necessary to proceed with repair work.

16. Yes, if required by ship's officers.

17. Yes.

18. Yes.

19. No. Bethlehem maintained no civilian guard at the ship.

20. Do not know.

21. Yes. [70]

22. Do not know what right of inspection Coast Guardsmen might have.

LILLICK, GEARY, McHOSE & ADAMS
JOHN C. McHOSE

By John C. McHose

Proctors for Respondent, Bethlehem Steel Company [71]

[Verified.] [72]

Received copy of the within Answers this.....day of November, 1946. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

Received copy of the within Answers of Respondent Bethlehem Steel Co. to Special Interrogatories this 13 day of January, 1946. Robert M. Newell, Attorney for Libellant.

[Endorsed]: Filed Jan. 14, 1947. [73]

[Title of District Court and Cause]

ANSWERS OF RESPONDENT TIDE WATER ASSOCIATED OIL COMPANY, TO SPECIAL INTERROGATORIES

1. The members of the crew aboard the vessel were there merely as a security watch. These members of the crew were paid by Tide Water Associated Oil Company, a corporation.

2. The name, last known address, rank and rating of the members of the security watch aboard at the time of the accident are: Asa H. Humble, 3rd Mate, 3660—47th St. San Diego, California; J. J. Schleef, Chief Engineer, 1275—12th Avenue, San Francisco, California; B. Bisagno, Bos'n, Fort Jones, California.

3. See answer to number 2.

4. O. Bengston, 1940 Anza Street, San Francisco, California.

5. The vessel was withdrawn from navigation.

6. To act as security watch.

7. The vessel had been delivered to the Bethlehem [74] Steel Corporation's repair yards for annual repairs and inspection and there was no reason for the security watch to inspect the same.

8. There were no fire hazards aboard the vessel. All machinery was shut down. The hull was in good condition.

9. No. The vessel had been delivered to the shipyard for repairs.

10. This is a question of law for the court to decide.

11. Employees of the shipyard are the only ones who can tell the nature of repairs or why the bunker hatch was uncovered.

12. No. The last part of the question is a question of law for the court to decide.

13. This question can be answered only by the persons who opened the hatch and left it open, none of whom was in the employ of this respondent.

14. There was no duty on the part of any person connected with this respondent to light it.

15. There was no duty on the part of this respondent to guard or rope off the bunker hatch.

16. This respondent knows nothing of the rules, if any, governing the actions of the employees of the shipyard with reference to the bunker hatch.

17. The vessel's crew had nothing to do with uncovering, or lighting or guarding or roping off the bunker hatch while the vessel was in the shipyard for inspection and repair.

18. No.

19. No.

20. This respondent does not know.

21. Chief Engineer Schleef was standing on the starboard side of the poop deck. Bos'n Bisgano was in the same place. Asa H. Humble, 3rd Mate, was in his quarters.

22. Not that this respondent knows of. [75]

23. No; excepting the two who were on the poop deck.

24. Tide Water Associated Oil Company knew that the statutes of the United States permitted certain designated persons in the Coast Guard to board the vessel any

time such persons were ordered to do so by proper authorities but has no information with reference to when such persons would board the vessel.

25. Tide Water Associated Oil Company had no power to restrict the Coast Guard from doing anything it undertook but would naturally expect any person to use the usual and ordinary means furnished for moving from one part of the vessel to another.

26. No member of the security watch has so stated; therefore this respondent does not know.

27. Respondent assumes so but has no actual knowledge thereof.

28. Respondent does not know.

29. Respondent does not know.

30. Respondent does not know what employees of this respondent may have done.

31. Respondent does not know what any employees of respondent may have done in this respect.

32. No.

33. The Master.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corp. [76]

[Verified.] [77]

Received copy of the within Answers to Interrogatories this 6th day of February, 1947. Irving Feintech & Gaines Hon, by H. Goodman, Proctors for Libellant.

Received copy of the within Answers to Interrogatories this 6th day of February, 1947, Proctors for Bethlehem Steel Co., 6 February 47, P. Raven.

[Endorsed]: Filed Feb. 7, 1947. [78]

[Minutes: Tuesday, February 11, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for trial; Irving Feintech, Gaines Hon. and Robert M. Newell, Esqs., appearing as counsel for the plaintiff; Messrs. Lillick, Geary, McHose and Adams, by John C. McHose, Esq., and Bryan C. Moore, Esq., appearing as proctor for respondent Bethlehem Steel Company; Lasher B. Gallagher, Esq., appearing as proctor for the Tide Water Associated Oil Co.; and both sides answering ready, the Court and respective counsel discuss the pleadings.

It is stipulated and ordered that the true name of the respondent sued as the Bethlehem Steel Corporation is Bethlehem Steel Company and that the libel may be amended by interlineation wherever the name appears in the libel, and the libel is amended at this time in open court.

On motion of the libelant it is ordered that the libel be dismissed as to the fictitiously named respondents.

On motion of respondent Bethlehem Steel Company it is ordered that the answer of the said respondent may be amended by interlineation to change the word "Delaware" to "Pennsylvania" in line 26 of page 1, and the answer is amended by interlineation at this time in open court.

Respective counsel stipulate to certain matters. Libelant's Exhibit 1 is offered and admitted in evidence. Attorney Hon makes an opening statement for the libelant.

At 11:05 A. M. court recesses. At 11:12 A. M. court reconvenes and all being present as before, it is ordered that the trial proceed. [79]

Attorney McHose makes opening statement in behalf of the respondent Bethlehem Steel Company. Attorney Gallagher makes opening statement in behalf of the respondent Tide Water Associated Oil Company.

David Lawton Richardson, libelant herein, is called, sworn, and testifies in his own behalf. Libelant's Exhibit 2 is marked for identification.

At noon court recesses until 2 P. M. At 2 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

David Lawton Richardson, libelant herein, resumes the stand and testifies further. Wm. R. Maloney, Jr., witness for libelant, is called, sworn, and testifies. Libelant's Exhibits 3, 4, and 5, respectively, are offered and admitted in evidence. At 3:20 P. M. Court recesses. At 3:30 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

David Lawton Richardson, libelant herein, heretofore sworn, resumes the stand and testifies further. Respondents' Exhibits A, B, and C are offered and admitted in evidence.

At 4:30 P. M. court recesses in this trial until 10 A. M., Feb. 12, 1947. [80]

[Minutes: Wednesday, February 12, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for further trial; Gaines Hon, Irving Feintech, and Robert M. Newell, Esqs., appearing as proctors for the libelant; Messrs. Lillick, Geary, McHose and Adams, by John C. McHose, Esq., and Bryan C. Moore, Esq., appearing as proctor for the respondent Bethlehem Steel Co.; Lasher B. Gallagher, Esq., appearing as proctor for the Tide Water Associated Oil Co.:

David L. Richardson, libelant, heretofore sworn, testifies further.

Chas. B. Hart, witness for libelant, is called, sworn, and testifies. At 11:05 A. M. court recesses. At 11:15 A. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

Chas. B. Hart testifies further. Frank B. Higbee, witness for libelant, is called, sworn, and testifies, and also testifies as a witness for the respondents. Libelant's Exhibit 6 is offered and admitted in evidence.

At 12:05 P. M. court recesses until 2 P. M. At 2 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

Frank B. Higbee resumes the stand and testifies further. At 2:45 P. M. court recesses. At 3 P. M. court reconvenes and all being present as before, it is ordered that the trial proceed.

John S. Stephens, witness for the respondents, is called out of order, is sworn, and testifies.

Wm. A. Harrington, witness for respondent Bethlehem Steel Co., is called out of order, sworn, and testifies.

Respondents' Exhibit D is offered and admitted in evidence. Respondents' Exhibit E is marked for identification.

At 4:40 P. M. court recesses in this trial until 10 A. M., Feb. 13, 1947. [81]

[Minutes: Thursday, February 13, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for further trial; Gaines Hon, Irving Feintech, and Robert M. Newell, Esqs., appearing for the plaintiff; John C. McHose and Bryan C. Moore, Esqs., appearing for respondent Bethlehem Steel Co.; Lasher B. Gallagher, Esq., appearing for respondent Tide Water Associated Oil Co.:

Libelant's Exhibit 2, heretofore marked for identification, is offered and admitted into evidence.

William A. Harrington, a witness for respondent Bethlehem Steel Co., heretofore sworn, resumes the stand and testifies further.

Attorney McHose makes an offer of proof in behalf of respondent Bethlehem Steel Co., which is rejected by the Court.

James E. Taylor, a witness for respondents, is called, sworn, and testifies.

David L. Richardson, libelant herein, heretofore sworn, is recalled and testifies further.

It is stipulated and ordered that the special interrogatories propounded by libelant to the respective respondents Bethlehem Steel Company and Tide Water

Associated Oil Co., be deemed read into evidence in the record.

At 11:05 A. M. court recesses and reconvenes at 11:15 A. M., all present as before. It is ordered that trial proceed. [82]

On motion of libelant it is ordered that amendment to the libel may be made amending article Second A and counsel is directed to file said amendment in writing.

Libelant rests.

William J. Courtiour, a witness for respondent Bethlehem Steel Co., is called, sworn, and testifies.

Libelant's Exhibit 7 is offered and admitted into evidence.

William J. Courtiour resumes the stand and testifies further.

Respondents' Exhibits F and G are offered and admitted into evidence.

J. J. Schleef, a witness for respondent Tide Water Associated Oil Co., is called, sworn, and testifies.

At 3:20 P. M. court recesses and reconvenes at 3:35 P. M.; all present as before. It is ordered that trial proceed.

J. J. Schleef resumes the stand and testifies further.

Respondent's Exhibit E is offered and admitted into evidence.

Asa H. Humble, Albert D. Vanover and Adrian Roland Frederick are respectively called, sworn, and testify for respondent Tide Water Associated Oil Co.

At 4:45 P. M. it is ordered that this cause be, and it hereby is, continued to February 14, 1947, at 10 A. M., for further trial. [83]

[Title of District Court and Cause]

AMENDMENT TO LIBEL

In accordance with the stipulation of the parties hereto, Libellant's Libel is hereby amended by inserting therein the following:

ARTICLE SECOND A

That at all times herein mentioned John One, John Five and John Six were the agents, servants and/or employees of the respondents, Bethlehem Steel Company, a corporation, and/or Tidewater Associated Oil Company, a corporation, and at all times herein mentioned were acting within the course and scope of their employment and/or agency.

GAINES HON

[Endorsed]: Filed Feb. 14, 1947. [84]

[Minutes: Friday, February 14, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

This cause coming on for further trial; Gaines Hon, Irving Feintech, and Robert M. Newell, Esqs., appearing for the libellant; John C. McHose and Bryan C. Moore, Esqs., appearing for respondent Bethlehem Steel Co.; Lasher B. Gallagher, Esq., appearing for respondent Tide Water Associated Oil Co.

Oscar Bengtson, a witness for respondent Tide Water Associated Oil Co., is called, sworn, and testifies.

Respondent Tide Water Exhibit H is marked for identification.

Court recesses at 10:50 A. M. and reconvenes at 11 A. M.; all present as before.

Oscar Bengtson resumes the stand and testifies further.

Both respondents rest. There is no rebuttal.

Attorney Hon files the amendment to the libel heretofore permitted by the Court.

Attorney Hon argues to the Court for the libelant.

Attorney McHose argues to the Court for respondent Bethlehem Steel Co.

At noon Court recesses to 2 P. M. Court reconvenes at 2 P. M.; all present as before. It is ordered that counsel proceed.

Attorney McHose argues further.

Attorney Gallagher argues to the Court for respondent Tide Water Associated Oil Co.

Attorney Hon argues to the Court in closing for the libelant. [85]

The Court orders the cause to stand submitted on the merits. Counsel are requested to file simultaneous memorandums of points and authorities by 5 P. M., 2-17-47. [86]

[Minutes: Friday, March 7, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

At 8:20 A. M. Court convenes in this cause on board the vessel "Frank G. Drum" in the Los Angeles harbor; the clerk and court reporter, being present; Gaines Hon and Irving Feintech, Esqs., being present as counsel for the libelant; Lasher B. Gallagher, Esq., being present as counsel for the Tide Water Associated Oil Co.; John

C. McHose, Esq., appearing as counsel for the Bethlehem Steel Co.

It is stipulated and ordered that the submission of this cause be, and it is, vacated and the trial re-opened for the purpose of adducing further evidence, consisting of an inspection by the Court of the scene of the accident.

The Court makes a tour of inspection, following the line of travel of the libelant from the time he came aboard the vessel until the accident occurred, according to his testimony. Respective counsel demonstrate to the Court the manner in which the accident may have occurred according to the testimony.

At 9 A. M. it is ordered that the cause now stand re-submitted to the Court and Court adjourns herein. [87]

[Minutes: Thursday, July 10, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

It appearing that the filing of further briefs is necessary herein, and that the same have been requested of counsel, and good cause appearing therefor,

It is ordered that the submission of the above-entitled matter is vacated, and the same is reset for submission on the calendar of August 11th, 1947, at 10 o'clock A. M. Counsel need not appear on such date unless notified. [88]

[Minutes: Monday, August 11, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

For submission on the merits; no appearances in behalf of either side;

Court orders cause stand submitted. [89]

[Minutes: Tuesday, August 12, 1947]

Present: The Honorable Jacob Weinberger, District Judge.

The Court concludes that libelant Richardson went aboard the tanker belonging to respondent Tide Water Associated Oil Company, and that when he boarded said ship, libelant did so as an invitee of the said respondent; that libelant was injured by falling through a port bunker hatch on said ship, which hatch was open and unlighted, thus creating a dangerous condition; that the injury to libelant was not occasioned, or contributed to by any negligence of said libelant.

That it did appear by a preponderance of evidence that respondent Tide Water Associated Oil Company was the owner of said tanker, and was in full possession and control of said tanker at the time of the accident, and that its officers and agents knew or should have known of said dangerous condition, and failed either to remedy said condition, or to warn libelant of the existence of such condition.

Libelant will prepare findings and judgment and submit same in accordance with the rules of this Court, within five days from date hereof, leaving blank spaces wherein the Court will insert the amount libelant shall recover, 1. for past and future pain and suffering; and 2. for past and future loss of earnings. [90]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case came on regularly for trial on February 11, 12, 13, and 14, 1947, before the Honorable Jacob Weinberger, United States District Judge. Messrs. Gaines Hon and Irving Feintech appeared for libelant; Messrs. Lillick, Geary & McHose, by John C. McHose and Bryan S. Moore, appeared for respondent, Bethlehem Steel Company, a corporation; and Lasher B. Gallagher appeared for respondent, Tide Water Associated Oil Company, a corporation. Evidence, both oral and documentary, was received by the court, and after the evidence had been closed and the case argued by counsel, the court ordered the case submitted upon memoranda of authorities, which were thereafter filed. On March 7, 1947, the court ordered the case reopened to permit the court to attend on board the tank vessel Frank G. Drum and examine the place of the accident. This was done and the court thereupon ordered the case resubmitted. There-[91] after, on July 10, 1947, the court ordered the case reopened for the filing of further briefs, and such briefs were filed. The case was thereupon resubmitted and the court, on August 12, 1947, announced its decision by minute order, and now makes the Following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The court finds that respondent Bethlehem Steel Company, a Pennsylvania corporation, was at all times mentioned in the libel, and now is, transacting business in the State and Southern District of California.

2. The court finds that respondent Tide Water Associated Oil Company, a Delaware corporation, was at all times mentioned in the libel, and now is, transacting business in the State and Southern District of California.

3. The court finds that at all times mentioned in the libel Tide Water Associated Oil Company was the owner and in charge and control of, and operating under time charter to the United States of America through the Administrator, War Shipping Administration, the tank vessel Frank G. Drum, which was on navigable waters of the United States, moored at the repair dock of Bethlehem Steel Company at Los Angeles Harbor, California, for the purpose of undergoing repairs.

4. The court finds that at all times mentioned in the libel libelant, David Lawton Richardson, was a member of the United States Coast Guard, acting in the capacity of Seaman First Class.

5. The court finds that on August 6, 1944 libelant was attached to Company "A", COTP Guard Batallion, Terminal Island, California, and was patrolling, among other things, docks in the control of Bethlehem Steel Company, and vessels located on navigable waters of the United States, including the Frank G. Drum, [92] owned by Tide Water Associated Oil Company.

6. The court finds that libelant's duties included attending on board certain ships, including the Frank G. Drum, to inspect conditions thereon and make certain that port security regulations in effect were being observed and maintained.

7. The court finds that respondents Bethlehem Steel Company and Tide Water Associated Oil Company knew that members of the United States Coast Guard would

make such inspections of docks and vessels, including the tank vessel Frank G. Drum, at Los Angeles Harbor during the times mentioned in the libel.

8. The court finds that at or about 9:10 p. m. on Sunday, August 6, 1944, libelant went on board the Frank G. Drum as a member of United States Coast Guard, pursuant to orders from his superior officers and in line with his duties, for the purpose of making such inspection.

9. The court finds that Tide Water Associated Oil Company brought the Frank G. Drum to a dock of Bethlehem Steel Company on or about July 26, 1944, and that Bethlehem Steel Company, pursuant to a contract to make certain repairs thereon, entered into with Tide Water Associated Oil Company, thereafter began to effect certain repairs to said vessel, including plate work in the port bunker tank which began on August 3, 1947 after said tank had been gas freed.

10. The court finds that the said contract for repairs was not a contract of bailment and that during the making of said repairs by Bethlehem Steel Company and while the vessel was at the repair yard, officers and members of the crew of the Frank G. Drum employed by Tide Water Associated Oil Company, remained on board, in charge and control of said vessel, and engaged in various work and labor and maintenance simultaneously with the performance of repair work and labor by Bethlehem Steel Company. [93]

11. The court finds that on Saturday afternoon, August 5, 1944, at about 3:00 p. m., Bethlehem Steel Company employees, who were engaged in doing repair work on board the Frank G. Drum, ceased work for the re-

mainder of that day and the next day, Sunday, August 6, 1944, and until 7 a. m. Monday morning, August 7, 1944.

12. The court finds that after the Bethlehem Steel Company employees ceased work the port bunker hatch of the Frank G. Drum, which was used by Bethlehem Steel Company employees as the sole means of ingress to and egress from the port bunker tank in which Bethlehem Steel Company was doing certain repair work to the plating of said vessel for Tide Water Associated Oil Company, was open.

13. The court finds that officers and members of the crew in control and charge of the Frank G. Drum, and who were employees of Tide Water Associated Oil Company, observed and knew that the port bunker hatch was open after the Bethlehem Steel Company ceased work on Saturday, August 5, 1944. The court further finds that with the knowledge and approval of Tide Water Associated Oil Company's employees, on board and in charge of the Frank G. Drum, said port bunker hatch remained open the remainder of that day and night and all day Sunday, August 6, 1944, and until the time of the accident and injury to libellant at or about 9:10 p. m. August 6, 1944.

14. The court finds that at the time and place of the happening of the accident, Tide Water Associated Oil Company knowingly, negligently, carelessly, and recklessly operated, conducted, controlled, and maintained that portion of the Frank G. Drum on which the port bunker hatch was located, in that officers and members of the crew in charge of said vessel knowingly, negligently, carelessly, and recklessly caused, maintained, and permitted the said port bunker hatch to remain open, unguarded

[94] and in a dark condition without any illumination whatever to warn people, and particularly libelant, on board said ship that said hatch was in said open, unguarded, and unlighted condition, all of which was well known to officers and members of the crew employed by Tide Water Associated Oil Company. The court further finds that the accident and injury to libelant was solely and proximately due to the fault, negligence, and carelessness of Tide Water Associated Oil Company. The court further finds that Tide Water Associated Oil Company was at fault and was careless and negligent at the time of the happening of the accident and injury to libelant in the following particulars:

(a) That at the times mentioned in the libel and for a prior to the happening of the accident period of approximately thirty hours [^] ~~theretofore~~, it permitted the hatch, approximately four feet by six feet in size, leading to the port bunker tank of said ship, which bunker tank was approximately 36 feet in depth, to remain open and unguarded.

(b) That at the times mentioned in the libel it permitted the hatch to the port bunker tank of said ship to remain in a dark and unlighted condition.

(c) That it failed and neglected to have or place illuminated signs or any signs or notices whatever to warn people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted.

(d) That there were no precautions taken by Tide Water Associated Oil Company to warn or advise people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted.

(e) That Tide Water Associated Oil Company, having knowledge of the open, unguarded, and unlighted condition of said hatch, failed and neglected to have any person at or near said open, unguarded, and unlighted hatch to inform people, including libelant, that the same was open, unguarded, and unlighted. [95]

(f) That Tide Water Associated Oil Company knew that said vessel would be inspected by a member of the United States Coast Guard such as libelant, and notwithstanding such knowledge permitted said hatch to remain open, unguarded, and unlighted.

15. The court finds that at the time of the occurrence of the injury to libelant the Frank G. Drum and the port bunker hatch thereon, were in charge and control of Tide Water Associated Oil Company, and were not in charge or control of Bethlehem Steel Company, and that no representative or employee of Bethlehem Steel Company was then on board said vessel.

16. That at the time of the happening of the accident and injury libelant was aboard the Frank G. Drum as an invitee of Tide Water Associated Oil Company, the owner and operator of said vessel.

17. That Tide Water Associated Oil Company, with knowledge of the existence of the dangerous condition of the port bunker hatch referred to in the libel, invited and permitted libelant to board said vessel for the purpose of making the inspection above referred to; that libelant, while making said inspection, and due to the negligence, carelessness, and recklessness of Tide Water Associated Oil Company, did fall into said open hatch a distance of approximately 36 feet to the bottom of said port bunker tank, thereby damaging and injuring libelant.

18. That as a result of the negligence of Tide Water Associated Oil Company libelant was hurt in his health, strength and activity, received a profound shock to his nervous system, and was made sick, sore and lame and was hurt about his head, limbs and body, and did receive a severe fracture of the femur causing permanent disability; that it is true that from said injuries libelant suffered great physical pain and mental anguish, and has had pain and suffering in the past and will have pain and suffering in the future, all to his damage in the sum of \$15,000.00. JW [96]

19. That libelant, due to said injuries, will suffer a permanent partial disability which has caused a loss in his earning capacity since his discharge from the United States Coast Guard, and will cause a permanent partial loss in his future earning capacity, all to libelant's further damage in the sum of \$14,400.00. JW

20. The court finds that the cause of libel is within the admiralty and maritime jurisdiction of the United States and of the Southern District of California.

21. The court finds that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were the result of an inevitable or unavoidable accident.

22. The court finds that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were caused or resulted by reason of any negligence of libelant.

23. The court finds that it is untrue that the accident, or the risk or the danger incident to the work in which libelant was engaged, or the risk or danger incident to the manner in which libelant was performing said work, or

the risk or danger then existing at the place of the accident, including the risk or danger of personal injury of a nature or in the manner suffered by libellant, were open or obvious or apparent or well known to libellant, or a man of his experience or calling.

24. The court finds that it is untrue that libellant carelessly or negligently or recklessly or voluntarily placed himself in a position where he was exposed to the risk of danger and injury of the nature that occurred to libellant.

25. The court finds that it is untrue that libellant was negligent in or about the premises.

26. The court finds that it is untrue that the injuries suffered by libellant were solely or proximately or in any degree whatever caused by recklessness or carelessness or negligence on [97] the part of libellant.

27. The court finds that it is untrue that libellant was guilty of any contributory negligence or recklessness or carelessness.

28. The court finds that it is untrue that libellant assumed any risk or danger or the risk or danger of the injuries suffered by libellant.

29. The court finds that it is untrue that at all or any times mentioned in the libel, the sole and exclusive right to control the operation of the Frank G. Drum was the prerogative of the United States or the Administrator, War Shipping Administration. The court finds that at all of said times the Frank G. Drum was under time charter to the United States through the Administrator, War Shipping Administration, but was operated and controlled by and in charge of its owner, Tide Water Associated Oil Company.

30. The court finds that at the time of the accident and injury to libelant no representative or employee of Bethlehem Steel Company was on board the Frank G. Drum, and that Bethlehem Steel Company owed no duty to Tide Water Associated Oil Company or to any other person or concern, to have or maintain any representative or employee on board said vessel.

31. The court finds that at the time of the accident the engines and boilers of the Frank G. Drum were shut down and that electrical power to meet the requirements for operating the vessel was supplied from ashore by Bethlehem Steel Company, which power was connected to the said vessel's main electrical switchboard, and use of all ship's lights thereon could be controlled by the officers and crew and those on board the Frank G. Drum.

32. The court finds that Bethlehem Steel Company did not have charge or control of the Frank G. Drum or of the port [98] bunker hatch thereon, at the time of the injury to libelant.

33. The court finds that it has not been established by the evidence that Bethlehem Steel Company was negligent in any way in connection with the performance by it of repair work on the Frank G. Drum pursuant to the contract of repair with Tide Water Associated Oil Company. The court finds that it has not been established by the evidence that Bethlehem Steel Company or its employees were responsible for leaving the port bunker hatch open and unguarded and unlighted at the time of the injury to libelant. The court further finds that even if the evidence established that Bethlehem Steel Company or its employees did leave the hatch open and unguarded when work in the port bunker tank ceased on Saturday afternoon, August

5th, this did not create a dangerous condition during daylight, and the condition only became dangerous after it became dark by reason of failure by Tide Water Associated Oil Company to provide lights at the port bunker hatch or give any warning of the dangerous condition there existing.

34. The court finds that lighting the portion of the ship around the port bunker hatch was within the control of and the duty of Tide Water Associated Oil Company, and not Bethlehem Steel Company.

35. The court finds that even if it should be found that Bethlehem Steel Company was negligent in leaving the port bunker hatch open and unguarded when work ceased Saturday afternoon, August 5th, such negligence would not have been the proximate cause, but could only have been a secondary cause of the injury to libelant. [99]

From the foregoing findings of fact, the court makes the following

CONCLUSIONS OF LAW

1. That at the time and place of the accident and injury to libelant. Tide Water Associated Oil Company was the owner and operator of and in full control and charge of the Frank G. Drum and the port bunker hatch thereon.

2. That libelant, David Lawton Richardson, committed no fault or negligence in the premises.

3. That libelant was on board the Frank G. Drum with the knowledge and consent of the owner, Tide Water Associated Oil Company, and at the time and place of the accident was an invitee of Tide Water Associated Oil Company.

4. That Bethlehem Steel Company was not a bailee of the Frank G. Drum at the time of the accident and injury to libelant.

5. That Tide Water Associated Oil Company was negligent in that it knowingly permitted the port bunker hatch to remain open and unguarded at the time and place when and where libelant was injured.

6. That Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition at the time and place when and where libelant was injured.

7. That Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition, and failed to warn libelant that such dangerous condition existed.

8. That the negligence of Tide Water Associated Oil Company was the sole and proximate cause of the accident and injury sustained by libelant.

9. That Bethlehem Steel Company committed no fault or [100] negligence in the premises. That even if the court found Bethlehem Steel Company to have been negligent in leaving the port bunker hatch open when it ceased work on Saturday, August 5th, the court concludes such negligence could not have been the primary or proximate cause of the accident and injury sustained by libelant, but could only have been a secondary cause, the primary cause

being the negligence of Tide Water Associated Oil Company.

10. That the libel against Tide Water Associated Oil Company shall be sustained, and that libelant shall be granted a final decree solely against respondent Tide Water Associated Oil Company for damages in the total sum of \$29,400.00 JW and for libelant's costs of suit herein.

11. That the libel against Bethlehem Steel Company shall be dismissed and Bethlehem Steel Company shall recover from Tide Water Associated Oil Company its costs of suit herein.

Let final decree be entered accordingly.

Dated: Los Angeles, California, August 30, 1947.

JACOB WEINBERGER
U. S. District Judge

Approved as to form as provided in Rule 7.

LILLICK, GEARY & McHOSE

By John C. McHose

Proctors for Respondent, Bethlehem Steel Company

Proctor for Respondent, Tide Water Associated
Oil Company [101]

Received copy of the within Findings etc. this 18th day of August, 1947. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

[Endorsed]: Filed August 30, 1947. [102]

In the District Court of the United States for the
Southern District of California
Central Division

In Admiralty No. 4574-W

DAVID LAWTON RICHARDSON,

Libelant,

vs.

BETHLEHEM STEEL CORPORATION, a corpora-
tion, et al.,

Respondents.

FINAL DECREE

By reason of the Law and the Findings of Fact on
file herein,

It Is Hereby Ordered, Adjudged and Decreed:

1. That libelant David Lawton Richardson do have
and recover from respondent Tide Water Associated Oil
Company, a corporation, the sum of \$29,400.00, J.W.
with interest thereon at 7% per annum from the date
hereof until paid.

2. That libelant David Lawton Richardson do have
and recover from respondent Tide Water Associated Oil
Company, a corporation, his costs of suit herein in-
curred as taxed herein pursuant to Rule 15 in the sum
of \$69.77.

3. That the libel against respondent Bethlehem Steel
Company, a corporation, be and the same is hereby dis-
missed.

4. That respondent, Bethlehem Steel Company, a corporation, do have and recover from respondent Tide Water Associated Oil Company, a corporation, its costs of suit herein as taxed [103] herein pursuant to Rule 15 in the sum of \$..... JW

Dated: Los Angeles, California, August 30, 1947.

JACOB WEINBERGER

United States District Judge

Approved as to form as provided in Rule 7.

LILLICK, GEARY & McHOSE

By John C. McHose

Proctors for Respondent, Bethlehem Steel Company

Proctor for Respondent, Tide Water Associated
Oil Company

Judgment entered Aug. 30, 1947. Docketed Aug. 30, 1947. C. O. Book 45, page 186. Edmund L. Smith, Clerk; by Louis J. Somers, Deputy. [104]

Received copy of the within Final Decree this 18 day of August, 1947. Lasher B. Gallagher, Proctor for Tide Water Associated Oil Co.

[Endorsed]: Filed Aug. 30, 1947. [105]

[Title of District Court and Cause]

ASSIGNMENTS OF ERROR

Now comes the Respondent Tide Water Associated Oil Company, a corporation, and hereby assigns the following errors in the above entitled proceeding:

I.

The Court erred in finding that at all times mentioned in the libel Tide Water Associated Oil Company was in charge and control of and operating under time charter to the United States the tank vessel Frank G. Drum.

II.

The Court erred in finding that on August 6, 1944, the libelant was patrolling vessels located on navigable waters of the United States, including the Frank G. Drum. [106]

III.

The Court erred in finding that libelant's duties included attending on board certain ships, including the Frank G. Drum, to inspect conditions thereon and make certain that port security regulations in effect were being observed and maintained.

IV.

The Court erred in finding that the respondent Tide Water Associated Oil Company knew that members of the United States Coast Guard would make such inspections of vessels, including the tank vessel Frank G. Drum at Los Angeles Harbor during the times mentioned in the libel.

V.

The Court erred in finding that at or about 9:10 p. m. on Sunday, August 6, 1944, libelant went on board the Frank G. Drum as a member of the United States Coast Guard, pursuant to orders from his superior officers and in line with his duties, for the purpose of making such inspection.

VI.

The Court erred in finding that the contract for repairs was not a contract of bailment and that during the making of said repairs by Bethlehem Steel Company and while the vessel was at the repair yard, officers and members of the crew of the Frank G. Drum employed by Tide Water Associated Oil Company, remained on board, in charge and control of said vessel and engaged in various work and labor and maintenance simultaneously with the performance of repair work and labor by Bethlehem Steel Company.

VII.

The Court erred in finding that officers and members of the crew in control and charge of the Frank G. Drum and who were employees of Tide Water Associated Oil Company observed and knew [107] that the port bunker hatch was open after the Bethlehem Steel Company ceased work on Saturday, August 5, 1944.

VIII.

The Court erred in finding that with the knowledge and approval of Tide Water Associated Oil Company's employees, on board and in charge of the Frank G. Drum, said port bunker hatch remained open the remainder of that day and night and all day Sunday, August 6, 1944,

and until the time of the accident and injury to libelant at or about 9:10 p. m. August 6, 1944.

IX.

The Court erred in finding that at the time and place of the happening of the accident, Tide Water Associated Oil Company knowingly, negligently, carelessly, and recklessly operated, conducted, controlled and maintained that portion of the Frank G. Drum on which the port bunker hatch was located, in that officers and members of the crew in charge of said vessel knowingly, negligently, carelessly and recklessly caused, maintained and permitted the said port bunker hatch to remain open, unguarded and in a dark condition without any illumination whatever to warn people, and particularly libelant, on board said ship that said hatch was in said open, unguarded, and unlighted condition, all of which was known to officers and members of the crew employed by Tide Water Associated Oil Company.

X.

The Court erred in finding that the accident and injury to libelant was solely and proximately due to the fault, negligence, and carelessness of Tide Water Associated Oil Company.

XI.

The Court erred in finding that "Tide Water Associated Oil Company was at fault and was careless and negligent at the time of the [108] happening of the accident and injury to libelant in the following particulars:

"(a) That at the times mentioned in the libel and for a period of approximately thirty hours ~~therefore~~ prior to the happening of the accident, it permitted

the hatch, approximately four feet by six feet in size, leading to the port bunker tank of said ship, which bunker tank was approximately 36 feet in depth, to remain open and unguarded.

“(b) That at the times mentioned in the libel it permitted the hatch to the port bunker tank of said ship to remain in a dark and unlighted condition.

“(c) That it failed and neglected to have or place illuminated signs or any signs or notices whatever to warn people, including libelant, on or about said ship that said hatch was open, unguarded and unlighted.

“(d) That there were no precautions taken by Tide Water Associated Oil Company to warn or advise people, including libelant, on or about said ship that said hatch was open, unguarded, and unlighted.

“(e) That Tide Water Associated Oil Company, having knowledge of the open, unguarded, and unlighted condition of said hatch, failed and neglected to have any person at or near said open, unguarded, and unlighted hatch to inform people, including libelant, that the same was open, unguarded, and unlighted.

“(f) That Tide Water Associated Oil Company knew that said vessel would be inspected by a member of the United States Coast Guard such as libelant, and notwithstanding such knowledge permitted said hatch to remain open, unguarded, and unlighted.”

XII.

The Court erred in finding that at the time of the occurrence of the injury to libelant the Frank G. Drum and the port bunker [109] hatch thereon, were in charge or control of Tide Water Associated Oil Company, and were not in charge or control of Bethlehem Steel Company.

XIII.

The Court erred in finding that at the time of the happening of the accident and injury libelant was aboard the Frank G. Drum as an invitee of Tide Water Associated Oil Company.

XIV.

The Court erred in finding that Tide Water Associated Oil Company, with knowledge of the existence of the dangerous condition of the port bunker hatch referred to in the libel, invited and permitted libelant to board said vessel for the purpose of making the inspection above referred to and that libelant while making said inspection and due to the negligence, carelessness and recklessness of Tide Water Associated Oil Company, did fall into said open hatch a distance of approximately 36 feet to the bottom of said port bunker tank, thereby damaging and injuring the libelant.

XV.

The Court erred in finding that as a result of the negligence of Tide Water Associated Oil Company libelant was hurt in his health, strength and activity, received a profound shock to his nervous system, and was made sick, sore and lame and was hurt about his head, limbs and body, and did receive a severe fracture of the femur causing permanent disability and from said injuries libelant

suffered great physical pain and mental anguish, and has had pain and suffering in the past and will have pain and suffering in the future, all to his damage in the sum of \$15,000.00.

XVI.

The Court erred in finding that libelant, due to said injuries, will suffer a permanent partial disability which has [110] caused a loss in his earning capacity since his discharge from the United States Coast Guard, and will cause a permanent partial loss in his future earning capacity, all to libelant's further damage in the sum of \$14,400.00.

XVII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by libelant by reason thereof, were the result of an inevitable or unavoidable accident.

XVIII.

The Court erred in finding that it is untrue that the accident and damages and injuries sustained by the libelant by reason thereof, were caused or resulted by reason of any negligence of libelant.

XIX.

The Court erred in finding that it is untrue that the accident, or the risk or the danger incident to the work in which libelant was engaged, or the risk or damage incident to the manner in which libelant was performing said work, or the risk or danger then existing at the place of the accident, including the risk or danger of personal injury of a nature or in the manner suffered by libelant,

were open or obvious or apparent or well known to libelant, or a man of his experience or calling.

XX.

The Court erred in finding that it is untrue that libelant carelessly or negligently or recklessly or voluntarily placed himself in a position where he was exposed to the risk of danger and injury of the nature that occurred to libelant.

XXI.

The Court erred in finding that it is untrue that libelant was negligent in or about the premises. [111]

XXII.

The Court erred in finding that it is untrue that the injuries suffered by libelant were solely or proximately or in any degree whatever caused by recklessness or carelessness or negligence on the part of libelant.

XXIII.

The Court erred in finding that it is untrue that libelant was guilty of any contributory negligence or recklessness or carelessness.

XXIV.

The Court erred in finding that it is untrue that libelant assumed any risk or danger or the risk or danger of the injuries suffered by libelant.

XXV.

The Court erred in finding that it is untrue that at all or any times mentioned in the libel, the sole and exclusive right to control the operation of the Frank G. Drum was the prerogative of the United States or the Administrator, War Shipping Administration.

XXVI.

The Court erred in finding that at all times mentioned in the libel the Frank G. Drum was operated and controlled by and in charge of its owner, Tide Water Associated Oil Company.

XXVII.

The Court erred in finding that at the time of the accident and injury to libelant the Bethlehem Steel Company owed no duty to Tide Water Associated Oil Company or to any other person or concern to have or maintain any representative or employee on board said vessel.

XXVIII.

The Court erred in finding that any ship's light which [112] would have illuminated the port bunker hatch was available to the officers or crew on board the Frank G. Drum or could have been controlled by the officers and crew and those on board the Frank G. Drum.

XXIX.

The Court erred in finding that Bethlehem Steel Company did not have charge or control of the Frank G. Drum or of the port bunker hatch thereon, at the time of the injury to libelant.

XXX.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company was negligent in any way in connection with the performance by it of repair work on the Frank G. Drum pursuant to the contract of repair with Tide Water Associated Oil Company.

XXXI.

The Court erred in finding that it has not been established by the evidence that Bethlehem Steel Company or its employees were responsible for leaving the port bunker hatch open and unguarded and unlighted at the time of the injury to libelant.

XXXII.

The Court erred in finding that even if the evidence established that Bethlehem Steel Company or its employees did leave the hatch open and unguarded when work in the port bunker tank ceased on Saturday afternoon, August 5th, this did not create a dangerous condition during daylight, and the condition only became dangerous after it became dark by reason of failure by Tide Water Associated Oil Company to provide lights at the port bunker hatch or give any warning of the dangerous condition there existing. [113]

XXXIII.

The Court erred in finding that lighting the portion of the ship around the port bunker hatch was within the control of and the duty of Tide Water Associated Oil Company, and not Bethlehem Steel Company.

XXXIV.

The Court erred in finding that even if it should be found that Bethlehem Steel Company was negligent in leaving the port bunker hatch open and unguarded when work ceased Saturday afternoon, August 5th, such negligence would not have been the proximate cause, but could only have been a secondary cause of the injury to libelant.

XXXV.

The Court erred in concluding from the findings of fact that at the time and place of the accident and injury to libelant, Tide Water Associated Oil Company was the owner and operator of and in full control and charge of the Frank G. Drum and the port bunker hatch thereon.

XXXVI.

The Court erred in concluding from the findings of fact that libelant, David Lawton Richardson, committed no fault or negligence in the premises.

XXXVII.

The Court erred in concluding from the findings of fact that libelant was on board the Frank G. Drum with the knowledge and consent of the owner, Tide Water Associated Oil Company, and at the time and place of the accident was an invitee of Tide Water Associated Oil Company.

XXXVIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company was not a bailee of the Frank G. Drum at the time of the accident and injury to libelant. [114]

XXXIX.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it knowingly permitted the port bunker hatch to remain open and unguarded at the time and place when and where libelant was injured.

XL.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition at the time and place when and where libelant was injured.

XLI.

The Court erred in concluding from the findings of fact that Tide Water Associated Oil Company was negligent in that it permitted the port bunker hatch to remain open and unguarded and in a dark and unlighted condition, and failed to warn libelant that such dangerous condition existed.

XLII.

The Court erred in concluding from the findings of fact that the negligence of Tide Water Associated Oil Company was the sole and proximate cause of the accident and injury sustained by libelant.

XLIII.

The Court erred in concluding from the findings of fact that Bethlehem Steel Company committed no fault or negligence in the premises and that even if the Court found Bethlehem Steel Company to have been negligent in leaving the port bunker hatch open when it ceased work on Saturday, August 5th, the Court concludes such negligence could not have been the primary or proximate cause of the accident and injury sustained by libelant, but could only have been a secondary cause, the primary cause being the negligence of [115] Tide Water Associated Oil Company.

XLIV.

The Court erred in concluding from the findings of fact that the libel against Tide Water Associated Oil Company shall be sustained, and that libelant shall be granted a final decree solely against respondent Tide Water Associated Oil Company for damages in the total sum of \$29,400.00, and for libelant's costs of suit herein.

XLV.

The Court erred in concluding from the findings of fact that the libel against Bethlehem Steel Company shall be dismissed and Bethlehem Steel Company shall recover from Tide Water Associated Oil Company its costs of suit herein.

XLVI.

The Court erred in failing to make a finding on the disputed allegation in Article Tenth of the Libel, that libelant's duties at said time and place as a member of the United States Coast Guard were to check upon guards on duty and make further checks on docks and ships to verify the reports of the Coast Guardsmen on duty and to make complete checkups on the docks and ships at said Bethlehem Steel Company and that at said time and place the respondents knew or in the exercise of ordinary care should have known all of the duties of libelant as above set forth.

XLVII.

The Court erred in failing to find with reference to the disputed allegation in Article Eleventh of the Libel that at about the hour of 9:10 p. m. on August 6, 1944, libelant entered said ship, SS Frank G. Drum, for the purpose of inspecting said ship for the benefit of the respondents. [116]

XLVIII.

The Court erred in failing to find on the disputed allegation that the respondents (which includes Bethlehem Steel Company) knowingly, negligently, carelessly, recklessly and unlawfully operated, conducted, controlled and maintained the SS Frank G. Drum and knowingly, negligently, carelessly, recklessly and unlawfully caused, maintained and permitted the hatch to the bunker of said ship to remain open and unguarded and in a dark condition without any illumination whatever to warn people on said ship that said hatch was in said condition and that all thereof was well known to the respondent Bethlehem Steel Company.

XLIX.

The Court erred in failing to find with reference to the disputed allegations in Article Twelfth that the accident was entirely due to the manifest incompetency, fault, negligence, carelessness and unlawfulness of respondent Bethlehem Steel Company, in the following particulars:

(a) At all times herein mentioned, the hatch to the bunker tank of said ship, which was approximately thirty-five (35) feet in depth, remained open and unguarded.

(b) At all times herein mentioned the hatch to the bunker tank of said ship was and remained in a dark condition without any illumination whatever.

(c) There were no illuminating signs or signs whatever to warn people on or about said ship that said hatch was open and unguarded.

(d) There were no precautions taken by respondent Bethlehem Steel Company to warn or let people

on or about said ship know that said hatch was open and unguarded.

(e) Respondent Bethlehem Steel Company failed and neglected to have any person at or near said unguarded [117] hatch to inform people at or near said hatch that the same was open and unguarded.

(f) That the respondent Bethlehem Steel Company permitted said hatch to remain open, unguarded and in a dark condition, all of which constituted a trap for people on said ship at or near said hatch.

(g) Respondent Bethlehem Steel Company knew that said ship would be inspected by a member of the United States Coast Guard and notwithstanding such knowledge permitted said hatch to remain unguarded and in a dark condition.

L.

The Court erred in failing to make any finding with respect to the disputed allegation in Article Thirteenth of the Libel that notwithstanding the knowledge and existence of the dangerous condition of the ship and the hatch thereon the respondent Bethlehem Steel Company invited and permitted libelant onto said ship for the purpose of making the inspection referred to in the libel.

LI.

The Court erred in failing to find on the disputed allegation in the Thirteenth Article that the respondent Tide Water Associated Oil Company invited and permitted the libelant onto the ship for the purpose of making the inspection referred to in the Tenth and Eleventh Articles and that the libelant while making such inspection did fall into the open hatch.

LII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of the Answer of Tide Water Associated Oil Company that at all times referred to in the libel the said vessel was under requisition charter to the United States of America and that at all times mentioned in the libel said vessel had been [118] withdrawn from navigation.

LIII.

The Court erred in failing to find on the affirmative allegation in Paragraph III of Tide Water Associated Oil Company's Answer that the said vessel, at all times mentioned in the libel, was an ocean vessel under the Flag or control of the United States and that the sole and exclusive right to control the operation, charter, requisition or use thereof was the prerogative of the Administrator, War Shipping Administration, as provided in and by Executive Order No. 9054, 7 Federal Register, 837, as amended by Executive Order No. 9244, 7 Federal Register, 7327, and that at none of the times or places referred to in the libel did said respondent have the right to control the operation or charter or requisition or use of said vessel.

LIV.

The Court erred in failing to make any finding with respect to the allegations of the Third Affirmative Defense of Tide Water Associated Oil Company that at all times referred to in the libel, libelant was a seaman of mature years, experienced in the employment in which he was then engaged and familiar with ships and ships' gear, machinery, working places, fixtures, appliances, equipment and appurtenances, and of their nature and functions

being employed and used aboard vessels of the type of the SS Frank G. Drum.

LV.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Second Affirmative Defense.

LVI.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Third Affirmative Defense. [119]

LVII.

The Court erred in failing to find affirmatively in favor of the allegations in Tide Water Associated Oil Company's Fourth Affirmative Defense.

LVIII.

The Court erred in failing to make any finding with reference to the disputed question whether the libelant was or was not an invitee of the Tide Water Associated Oil Company at the specific part of and location on the ship where the accident happened.

LVIX.

The Court erred in failing to make any finding with reference to whose servants, agents or employees removed the rope guards which were around the port bunker tank at the time the vessel was brought to the shipyard of Bethlehem Steel Company and whose servants, agents and employees removed the port bunker hatch cover from its supporting stiff-leg and arranged it so that it was in the position it occupied at the time of the accident.

LX.

The Court erred in failing to conclude that the libelant is not entitled to recover any sum whatever from the respondent Tide Water Associated Oil Company and that the libel should be dismissed with costs to said respondent Tide Water Associated Oil Company.

LXI.

The Court erred in failing to find that Bethlehem Steel Company was guilty of negligence proximately causing or proximately contributing to the injuries sustained by the libelant.

LXII.

The Court erred in making Final Decree in favor of libelant and Bethlehem Steel Company and against Tide Water Associated Oil Company. [120]

LXIII.

The Court erred in ordering the libel against the respondent Bethlehem Steel Company dismissed.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation

[Endorsed]: Filed Sep. 8, 1947. [121]

[Title of District Court and Cause]

PETITION FOR APPEAL

To the Honorable Paul J. McCormick, Judge of the
United States District Court, Southern District of
California, Central Division:

Respondent Tide Water Associated Oil Company, a corporation, respectfully prays that it may be permitted to take an appeal from the Final Decree entered in the above Court on August 30th, 1947, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the Assignments of Error which is filed herewith and your petitioner desires to supersede the execution of said Final Decree, and herewith tenders a bond in the amount of Thirty Five Thousand Dollars (\$35,000.00), for such purpose, and prays that a superseas be allowed as part of the allowance of said appeal.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation

[Endorsed]: Filed Sep. 8, 1947. [122]

[Title of District Court and Cause]

STIPULATION

This action having been tried and decided by the Honorable Jacob Weinberger, and said trial Judge now being unavailable by reason of his vacation;

It Is Stipulated, by and between the parties, that petition for an order allowing appeal may be presented to the Senior Judge for the Southern District of California, Honorable Paul J. McCormick, with like effect as if said petition were presented to the said trial Judge.

Dated: September 4th, 1947.

GAINES HON and
IRVING FEINTECH
GAINES HON

Proctors for Libelant

LILLICK, GEARY & McHOSE
JOHN C. McHOSE

Proctors for Respondent Bethlehem Steel
Corporation, a corporation [123]

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Company, a corporation

It Is So Ordered.

Dated: September 8, 1947.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [124]

[Title of District Court and Cause]

ORDER ALLOWING APPEAL

The petition of respondent Tide Water Associated Oil Company, a corporation, for an appeal from the Final Decree entered in the above entitled cause on August 30th, 1947, is hereby granted and the appeal is allowed.

It Is Further Ordered that a certified transcript of the record herein be forthwith transmitted to the United States Circuit Court of Appeals, for the Ninth Circuit, and

It Is Further Ordered that upon petitioner filing a bond in the sum of Thirty Five Thousand Dollars (\$35,000.00), with sufficient surety or sureties and conditioned as required by law, the same shall operate as a supersedeas of the decree made and entered in the above cause, and shall suspend and stay all further proceedings in this Court until the determination of said appeal to the said United States Circuit Court of Appeals. [125]

Dated at Los Angeles, California, this 8th day of September, 1947.

PAUL J. McCORMICK

United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [126]

[Title of District Court and Cause]

NOTICE OF APPEAL

The respondent Tide Water Associated Oil Company, a corporation, hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the Final Decree of this Court entered herein on August 30th, 1947, and from each and every part of said Decree.

Dated: September 5th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated Oil
Company, a corporation

To: Edmund L. Smith,
Clerk, United States District Court;
Gaines Hon and Irving Feintech
315 W. Ninth Street, Los Angeles 15,
Proctors for Libelant;
Lillick, Geary & McHose
634 So. Spring St., Los Angeles 14,
Proctors for Respondent Bethlehem
Steel Corporation, a corporation.

[Endorsed]: Filed; mld. copy to Hon & Jarrett, 315
W. 9th St., L. A. 15, Atty. for Lib., Sep. 8, 1947. [127]

[Title of District Court and Cause]

[Affidavit of Service by Mail to Messrs. Lillick, Geary
& McHose, 634 South Spring Street, Los Angeles 14,
California.]

[Endorsed]: Filed Sep. 10, 1947. [128-129]

[Title of District Court and Cause]

STIPULATION RE AMOUNT OF SUPERSEDEAS
AND COST BOND

It Is Hereby Stipulated, by and between the parties,
that the respondent Tide Water Associated Oil Company,
a corporation, may file a supersedeas and cost bond in the
single and total sum of Thirty-five Thousand Dollars
(\$35,000.00).

Dated: September 3rd, 1947.

GAINES HON and
IRVING FEINTECH
GAINES HON

Proctors for Libelant

LILLICK, GEARY & McHOSE
JOHN C. McHOSE

Proctors for Respondent Bethlehem Steel
Corporation, a corporation

LASHER B. GALLAGHER
Proctor for Respondent Tide Water Associated
Oil Company [130]

It Is So Ordered.

Dated: September 8th, 1947.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [131]

[Title of District Court and Cause]

BOND ON APPEAL
(Supersedeas and for Costs)

Know All Men By These Presents:

Whereas, respondent Tide Water Associated Oil Company, a corporation, has appealed or is about to appeal from that certain Final Decree heretofore made and entered in the above entitled cause on August 30th, 1947; and

Whereas, Western National Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the Libelant herein and unto whom it may concern in the sum of Thirty Five Thousand and No/100 Dollars (\$35,000.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these presents and agrees that in case of default or contumacy on the part of the said Appellant, Tide Water Associated [132] Oil Company, a corporation, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above named Appellant shall prosecute its appeal with effect and answer all damages and costs if it fails to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, this 5th day of September, 1947.

WESTERN NATIONAL INDEMNITY
COMPANY, a corporation

By A. I. Stoddard

Attorney-in-Fact

State of California

County of Los Angeles—ss.

On this 5th day of September, 1947, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Western National Indemnity Company and acknowledged to me that he subscribed the name of Western National Indemnity Company thereto as principal, and his own name as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed by official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

(Seal)

M. E. BEETH

Notary Public in and for the County of Los Angeles,
State of California

My commission expires March 24, 1949.

Examined and recommended for approval as provided in Rule 13.

LASHER B. GALLAGHER

Proctor for Appellant Tide Water Associated
Oil Company, a corporation

I hereby approve the foregoing bond this 8th day of September, 1947.

PAUL J. McCORMICK

United States District Judge

The premium charged for this bond is \$700.00 per annum.

[Endorsed]: Filed Sep. 8, 1947. [133]

[Title of District Court and Cause]

NOTICE OF FILING BOND ON APPEAL

To the Libelant and to his Proctors Gaines Hon and Irving Feintech; to the Respondent Bethlehem Steel Company, a corporation, and to its Proctors, Messrs. Lillick, Geary & McHose:

You and Each of You Will Please Take Notice that the bond on the appeal herein was approved by the Honorable Paul J. McCormick, and was filed in the office of the Clerk of the District Court of the United States, for the Southern District of California, Central Division, on the 8th day of September, 1947, and said bond was executed and given by the Western National Indemnity Company, a corporation, authorized to execute surety bonds pursuant to the laws of the State of California, said bond being in the sum of Thirty Five Thousand Dollars (\$35,000.00), and is by reference thereto made a part of this Notice.

Dated: September 8th, 1947.

LASHER B. GALLAGHER

Proctor for Respondent Tide Water Associated
Oil Co., a corporation [134]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 10, 1947. [135]

[Title of District Court and Cause]

STIPULATION RE TRANSMITTAL OF EXHIBITS
AND REPORTER'S TRANSCRIPT TO APPEL-
LATE COURT

It Is Hereby Stipulated that the original exhibits in the above entitled matter and the reporter's transcript of the proceedings need not be reproduced or otherwise incorporated in the record on appeal to be transmitted to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, by the Clerk of the United States District Court, but that the originals of said exhibits and the original reporter's transcript may be transmitted to the Clerk of the Circuit Court of Appeals, for the Ninth Circuit, to be there considered as part of the record on appeal required to be sent from the United States District Court to the Circuit Court of Appeals with the same force and effect as though the same were and each thereof was reproduced and thus incorporated in the record on appeal.

Dated: September 3rd, 1947. [136]

GAINES HON and
IRVING FEINTECH
GAINES HON

Proctors for Libelant

LILLICK, GEARY & McHOSE
JOHN C. McHOSE

Proctors for Respondent Bethlehem Steel
Corporation, a corporation

LASHER B. GALLAGHER
Proctor for Respondent Tide Water Associated
Oil Company, a corporation

It Is So Ordered.

Dated: September 8th, 1947.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Sep. 8, 1947. [137]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 143 inclusive contain the original Citation on Appeal and full, true and correct copies of Libel in Personam; Respondent Tide Water Associated Oil Company's Exceptions to Libel; Answer of Libelant to Exceptions to Libel; Minute Orders Entered December 24, 1945, March 13 and 19, 1946; Answer of Respondent Bethlehem Steel Company; Answer of Respondent Tide Water Associated Oil Company; Special Interrogatories to Respondent Tide Water Associated Oil Company; Minute Order Entered October 18, 1946; Special Interrogatories to Respondent Bethlehem Steel Company; Answers of Respondent Bethlehem Steel Company to Special Interrogatories; Answers of Respondent Tide Water Associated Oil Company to Special Interrogatories; Minute Orders Entered February 11, 12 and 13, 1947; Amendment to Libel; Minute Orders

Entered February 14, March 7, July 10, August 11 and 12, 1947; Findings of Fact and Conclusions of Law; Final Decree; Assignments of Error; Petition for Appeal; Stipulation and Order of September 4, 1947; Order Allowing Appeal; Notice of Appeal; Affidavit of Service; Stipulation and Order re Amount of Supersedeas and Cost Bond; Bond on Appeal; Notice of Filing Bond on Appeal; Stipulation and Order re Transmittal of Exhibits and Transcript; Praecipe for Apostles on Appeal and Counter Designation of Praecipe for Apostles on Appeal which, together with original Reporter's Transcript of proceedings on February 11, 12 and 13 and March 7, 1947; and Original Libelant's Exhibits 1 to 7, inclusive and original Respondents' Exhibits A to H, inclusive, transmitted herewith, constitute the Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing apostles amount to \$33.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13 day of October, A. D. 1947.

(Seal)

EDMUND L. SMITH

Clerk

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause]

Honorable Jacob Weinberger, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
Tuesday, February 11, 1947

Appearances:

For the Plaintiff: Feintech and Gaines Hon, by Gaines Hon and Robert M. Newell.

For the Defendant Tide Water Associated Oil Company: Lasher B. Gallagher.

For the Defendant Bethlehem Steel Corporation: Lillick, Gary, McHose & Adams, by John C. McHose and Bryan C. Moore.

Los Angeles, California, Tuesday, February 11, 1947,
10:00 A. M.

(Case called by clerk.)

Mr. Feintech: The libellant is ready.

The Court: Let's see. We have had a pre-trial in this case?

Mr. Hon: Yes, your Honor.

The Court: Is there an order on file?

The Clerk: No, your Honor. Counsel said they could cover anything by stipulation and you waived it.

Mr. McHose: I think that is correct.

Mr. Hon: We actually had a pre-trial, your Honor.

The Court: I don't see anything of record. I am wondering if there were some stipulations. I haven't any transcript here.

Mr. Gallagher: It is my recollection, your Honor, that we arrived at no stipulations of any kind.

Mr. Hon: I am not definite on that, your Honor. I know we spent about half an hour attempting to get stipulations but just what all took place I can't recollect.

The Court: I am wondering if we can save any time this morning by going through the pleadings to see what matters we can agree upon. Shall we proceed along that line?

Mr. Hon: I would be pleased to, your Honor. I think it would probably save the court's time if we could do that. [2*]

Mr. McHose: It is agreeable to us, your Honor.

The Court: What about the John Does? What are you going to do with those?

Mr. Hon: I guess we can dismiss as to the John Does. No one was served.

The Court: The only parties involved are the Bethlehem Steel Company, a corporation, and the Tide Water Associated Oil Company, a corporation?

Mr. McHose: May we stipulate, Mr. Hon, that the Bethlehem Steel Corporation is an incorrect name? We have set forth in our answer that the proper name is the Bethlehem Steel Company, a corporation.

Mr. Hon: Then, I would like it, by interlineation in the caption and every place in the body of the libel, to read "Bethlehem Steel Company, a corporation."

The Court: "Co." or the full name?

Mr. McHose: Written out, your Honor. We have set that up in our answer.

Mr. Hon: Then, it should be "Bethlehem Steel Company, a corporation."

The Court: So ordered. Is it the same company? I mean in so far as the state of its organization is concerned.

Mr. McHose: Our answer sets that forth. There is a Bethlehem Steel Corporation but it is not authorized to do business in California, and the Bethlehem Steel Company is [3] doing business in the State of California.

The Court: Organized under the laws of what State?

Mr. McHose: The answer states the State of Delaware, but I have a notation that that is wrong and it should be the State of Pennsylvania. I don't believe it makes any difference. It is incorporated in either the State of Pennsylvania or Delaware and we know the company that is involved and, if judgment is entered against the Bethlehem Steel Company, it will be recognized.

The Court: We should have the proper company, wherever it is organized, covered by stipulation.

Mr. McHose: I believe it is the State of Pennsylvania and I suggest that we might be permitted to amend the answer, on line 26, page 1, to state a corporation organized and existing under the laws of the State of Pennsylvania.

Mr. Hon: No objection.

The Court: That will be ordered. Transacting business in the State of California?

Mr. McHose: In the State of California.

The Court: What about the Tide Water Associated Oil Company? Is that the proper designation?

Mr. Gallagher: Yes, your Honor.

The Court: There is no change there?

Mr. Gallagher: No, sir. I assume we can ignore the third and fourth articles and the fifth and the sixth. [4]

The Court: You have moved to dismiss all of the fictitious defendants, have you?

Mr. Hon: I have agreed to; yes, your Honor.

The Court: Will you do that now?

Mr. Hon: Yes, sir.

The Court: So ordered.

Mr. McHose: We could, then, strike out the third, fourth, fifth, sixth and seventh articles of the complaint.

Mr. Hon: Your Honor, I don't want to dismiss articles three, four, five and six. I agreed to dismiss as to the fictitious defendants but not to strike any paragraphs of the complaint. They will do no harm in the complaint.

The Court: The record shows the dismissal of these fictitious defendants. But what is the effect of these articles three, four and five, if you have no such fictitious defendants?

Mr. Hon: Your Honor, there are allegations in there charging certain duties upon the corporations and the employees of the corporations. They are contained in those particular articles and might not be sufficiently stated in other articles. So I think; to keep my complaint proper, I would have to leave that in in order to properly charge the duties to these corporations. It might be a technicality that might be harmful to the libellant's case by dismissing the paragraphs. But, in view of the fact that none of the [5] fictitious parties have been served, it would serve no purpose in keeping them in as defendants.

Mr. Gallagher: Well, if your Honor please, there is no issue raised in so far as the allegations of articles third, fourth, fifth, sixth and seventh are concerned and, if the proctor for libellant takes the position that he must designate certain people in order to state facts sufficient to constitute a cause of action, then his libel does not state facts sufficient to constitute a cause of action. And on that ground at this time the respondent, the Tide Water Associated Oil Company, a corporation, will object to the introduction of any proof upon the ground that the libel does not state facts sufficient to constitute a cause of action. If they intend to charge some specific individual as an employee of Tide Water and thus charge Tide Water through its employee with certain alleged duties, they have got to set forth who it is, or at least describe them, so that we know whom they are talking about.

The Court: Isn't that a matter of proof without allegations in the complaint? If the defendants, or either of them, are charged with negligence, or both, through their agents and servants, is it necessary to cover that feature of it by a recital in the complaint other than the general statement that these defendants, through their agents and servants, without naming them, did so and so? [6]

Mr. Gallagher: They don't do that.

Mr. Hon: Yes, your Honor; we do that in those paragraphs that they want dismissed. That is why I do not want to dismiss them. We don't know the names of the employees. That is peculiarly within the knowledge of the respondents.

The Court: In other words, this is the method, that you have named those employees, without making them parties to the litigation, is that right?

Mr. Hon: That is right.

The Court: I see nothing harmful in that if that is the purpose. However, you have designated them as respondents.

Mr. Hon: But they are also referred to as employees, your Honor. One paragraph takes that up and refers to the fact that they were employees.

The Court: Let's see. Article three—

Mr. Hon: Article three, your Honor, merely says we do not know their names or capacities, and we assert we will amend the libel by appropriate amendments. That is just merely saying we are ignorant of the true names or capacities.

The Court: You say libellant is ignorant of the true names of the respondents.

Mr. Hon: They were respondents at the time. I can change that now. It would be merely a play on words to change it and say what employees. [7]

The Court: It is your pleading.

Mr. Hon: I would be willing to stand on the pleading as framed, your Honor, and, if there is any question in that respect, I would not want to gamble the libellant's interest in this lawsuit. I would like permission, then, to withdraw the offer to dismiss and leave it as respondents, even though not served. There is no rule requiring us to dismiss.

Mr. McHose: You cannot add parties to this action as respondents, Mr. Hon, since they have not been served and brought into court.

Mr. Hon: Merely unnamed respondents, is all. There is no rule requiring that an employee be sued along with his master because the theory of respondeat superior applies.

The Court: There is no appearance here on the part of any such employee. The only appearance is on the part of the principal.

Mr. Hon: That is right and those are the only persons we are going after.

The Court: But these parties are not respondents.

Mr. Hon: Would you want me to go through them and, by interlineation, designate them properly?

The Court: I would like to know who is being sued here.

Mr. Hon: The only parties served are the two corporations who have answered.

The Court: Then, they are the only parties to this liti- [8] gation—

Mr. Hon: That is right.

The Court: —other than the libelant?

Mr. Hon: That is right.

The Court: If you wish to designate certain employees, whom you do not know at this time, if they are called to the witness stand, there is nothing wrong about the designation of John Doe but, if you designate those people as respondents when they are not respondents, I think you should straighten the pleadings out on that.

Mr. Hon: I can do that within a few minutes, your Honor.

Mr. McHose: I would suggest you can cover it very simply by striking out articles third and fourth. And you can correct article five by striking out the word

“respondent” and then make it “That at all times herein mentioned the defendant, John One, was the agent, servant” and so on.

Mr. Hon: I think that would take care of it.

Mr. McHose: And the same thing is true in article six. As I understand you, you want to leave in the allegations that someone was acting as an agent for the respondents in this action?

Mr. Hon: That is right.

Mr. McHose: You don't claim any cause of action against that person? [9]

Mr. Hon: That is right.

Mr. McHose: And you have made no service against them?

Mr. Hon: That is right.

The Court: You may work that out in the manner in which you think it should be worked out.

Mr. Hon: All right; in the recess, your Honor, or I will do that before the trial is completed.

The Court: Yes.

Mr. Hon: That would take us to article eight.

The Court: You have a fictitious named owner, John Four.

Mr. Hon: Yes. I don't think there is any question, your Honor, and is there, Mr. McHose, but what the ship was docked at the Bethlehem Steel Company's docks?

Mr. McHose: I think we can facilitate the matter, if the court please; if we can stipulate to two things; first, in so far as Bethlehem is concerned, we will stipulate that the Frank Drum was at the repair docks of the Bethlehem Steel Company at the time alleged in the complaint. We will also stipulate that it was at the yard at that place and time for the purpose of undergoing

repairs which were being effected by the Bethlehem Steel Company. I think that with respect to the Tide Water Associated Oil Company, Mr. Gallagher may stipulate and I believe he has stated in his answer that the vessel was owned at that time and place by the Tide Water [10] Associated Oil Company. Is that correct?

Mr. Gallagher: That is correct.

Mr. McHose: Now, I think there is only one other point we should clear up in connection with a part of the allegations of Article three of the answer of the Tide Water Associated. It is set up that the vessel was under charter to the United States Government. I think we ought to clear up whether the United States Government as charterer of the vessel has any interest or responsibility in this litigation.

The Court: Before we get into that, the ownership is settled. It is the Tide Water Associated. It is stipulated that that corporation is the owner of the vessel, is that correct?

Mr. Gallagher: That is correct.

The Court: And that the owner caused the boat to be taken to the dock for the purpose of repairs and that repairs were being made on that vessel?

Mr. Gallagher: As I understand it, your Honor, the vessel was being made ready to be turned over to the Navy on a bare boat charter, or the Navy was going to take it over and operate it, in any event, and, consequently, the vessel was withdrawn from navigation and remained at the shipyard until all of the work was completed.

The Court: Before we get into that, let's settle the [11] question of what was the boat doing there. The vessel was there for the purpose of repairs, was it?

Mr. Gallagher: Annual inspection, repairs and alterations.

The Court: Do you stipulate to that?

Mr. Gallagher: Yes. But I am not the only one who should stipulate. It is no good for me to stipulate all by myself.

The Court: You represent the owner of the vessel.

Mr. Gallagher: That is right.

Mr. McHose: We join in that stipulation.

Mr. Hon: Let's get the stipulation first. What was the stipulation? I didn't understand it.

Mr. Gallagher: I stipulated, or offered to stipulate, that the Tide Water Associated Oil Company was the owner of the vessel at the time this accident happened and that the vessel had been delivered to the Bethlehem Steel Company for the purpose of having alterations and repairs and inspection made. Is that satisfactory to you?

Mr. Hon: Yes; that is satisfactory.

The Court: At the time of the accident?

Mr. Gallagher: At the time of the accident.

The Court: And delivered by the owner of the vessel?

Mr. Gallagher: Yes, to Bethlehem. [12]

Mr. McHose: I can't quite join in that stipulation and I want to make it clear. One of the issues in this case will be, if you should decide that there is liability to this libellant, which Mr. Gallagher and I feel sure should not be, there is question of responsibility to be determined as between the Associated Oil Company and the Bethlehem Steel Company. And we will offer evidence to show the exact status of this ship in our yard. My objection to the stipulation as phrased by Mr. Gallagher is his statement that it had been delivered to the Bethlehem Steel Company. I will stipulate that it was

brought into the yard of the Bethlehem Steel Company: that it remained at all times—or I mean our position will be, and I wouldn't ask anyone else to stipulate to this—but I want the record to be clear that our position will be that the ship remained at all times in the possession and control of the Tide Water Associated Oil Company, and we will agree that it had been brought into our yard and was there for the purpose of undergoing repairs.

Mr. Hon: That will be satisfactory to the libelant.

The Court: That covers the stipulation that I had in mind thus far, that it was delivered, for the purpose of repairs, at the yard of the Bethlehem Steel Company.

Mr. McHose: I don't like the use of the word "delivered." That perhaps means or sounds something like you take your automobile into a garage and leave it there to be [13] repaired, which is an entirely different situation from what we have here, where the ship came into the yard but was still in charge of the Tide Water Associated Oil Company, with its own officers on board the ship.

Mr. Gallagher: The evidence will show that the ship was absolutely dead and, if they didn't have a full crew, they couldn't have done a thing with it. It is the same as taking your automobile to a garage, if you have got a trailer on it and sleep in it—

Mr. Hon: Why couldn't we have a stipulation to this effect: We accept the stipulation but the question of the control will be a question of fact for the court to determine?

Mr. McHose: That will be agreeable.

Mr. Gallagher: I prefer to let the evidence come in on that subject, your Honor.

The Court: Then, we will pass that. There is no stipulation, is there?

Mr. Hon: As I understand it, your Honor, there is no question but what the ship was owned by Tide Water and that there is no question but what it was at the Bethlehem docks for repairs. That is true, isn't it?

Mr. Gallagher: And other things; yes.

Mr. Hon: And other things. What they are I don't know. And there is no question that on the night of the accident but [14] what it was docked at Bethlehem's shipyard for repairs, and it was owned by Tide Water Oil Company, and that whoever had the control is a question of fact.

The Court: Is that agreeable to you gentlemen?

Mr. Gallagher: I think that is the situation.

The Court: Then, that may be stipulated.

Mr. McHose: The point that I wanted to clear up with respect to Article eight has to do with the allegation of the answer that at the time the vessel was under charter to the United States Government—I think we ought to be able to cover that by stipulation.

Mr. Gallagher: I have got a photostatic copy of the charter, which I am perfectly willing to have introduced in evidence, but I don't think we can cover the legal effect of the time charter in any stipulation that could be stated in a paragraph or two.

Mr. McHose: I am quite agreeable to let you show the situation but I would like to know, for the purposes of the present status of this case, whether your contention is going to be that the vessel was under charter to the United States at the time this accident happened and whether there is any responsibility of the United States under that charter so far as this action is concerned.

Mr. Gallagher: I don't think that is a point here involved. [15]

The Court: I gather from the pleadings and the particulars that are on file that this ship was being made ready for some service in behalf of the United States.

Mr. Gallagher: It already had been in the service of the United States under a time charter, your Honor. And one of the questions that your Honor is going to have to decide is whether people coming aboard the vessel during the time charter come aboard as the employees of the United States Government, if they are in that capacity, or whether they come aboard as licensees of some other entity or whether they come aboard as trespassers, so far as the owner of the vessel is concerned and so far as the shipyard is concerned. I take the position to be that it is comparable to the lease of a house. If I lease my house to your Honor and I furnish you with a cook and housekeeper as part of the lease, people who come into the house are not my invitees merely because my cook and housekeeper are there doing the sweeping and cooking. They are your invitees.

The Court: We will get to that later but in the meantime, if the charter situation is important in this litigation, we ought to determine that now.

Mr. Gallagher: I have got it here.

The Court: The vessel was under charter to the United States Government, was it?

Mr. Gallagher: That is right. [16]

The Court: And it had been prior to that time?

Mr. Gallagher: That is right.

The Court: And that charter was effective at the time in question, was it?

Mr. Gallagher: Yes, your Honor.

The Court: Even though the boat was in inactive status?

Mr. Gallagher: Yes. In other words, the charter provided, in substance, that certain work had to be done and, whenever it had to be done, it was to be done at the convenience of the owner and the charterer. There are certain laws that have to be complied with with reference to annual inspections and necessary repairs.

The Court: Of course, the United States is not a party to this litigation?

Mr. Gallagher: No. Maybe it should be.

Mr. Hon: Further along that point, could it be stipulated whose employees went on that boat at the time of the accident?

The Court: Before we get to that, let's get this charter situation out of the road. Do you want to offer that in evidence now?

Mr. Gallagher: Yes; I think I might as well.

The Court: Do you stipulate to that charter?

Mr. Gallagher: The proctor for libelant examined it. Mr. Newell came to the office and looked it over. It is in [17] four parts. I think only the first two parts have anything to do with this time involved. This accident happened in 1944 and the last two portions of the charter purport to have been executed on the 9th of January, 1945 and the 10th of January, 1946. The other two were executed prior to that time.

Mr. McHose: Can we stipulate, Mr. Gallagher, to this, that, at the time the accident happened, the time charter was in effect? I mean is that going to be your position, that the time charter was in effect?

Mr. Gallagher: The time charter; yes, sir.

Mr. McHose: And the bare boat charter did not go into effect until after the accident happened?

Mr. Gallagher: That is correct.

The Court: What is that?

Mr. Gallagher: A bare boat charter is where the owner turns the vessel over to the charterer. That means without anything excepting the vessel itself.

The Court: Do you all join in that stipulation?

Mr. McHose: I will accept Mr. Gallagher's statement on that that it is a fact. And the time charter that was in effect is the time charter which you propose to introduce?

Mr. Gallagher: Yes; that is my information. I have never seen the original.

The Court: What is the date of the time charter? [18]

Mr. Gallagher: I think the first one was April 20, 1942.

Mr. McHose: Do you know the date when the vessel was redelivered to the owner, Mr. Gallagher?

Mr. Gallagher: No.

Mr. McHose: Are you quite certain that the vessel had not been re-delivered to the owner at the time the accident happened? I think you ought to be sure of that before you stipulate to it.

Mr. Gallagher: I think so, too. I never received any information on that because it never occurred to me to ask about it. We had better let this charter business go, your Honor, until I ascertain that fact.

The Court: Very well; we will pass that for the time being. Now, as to article nine—

Mr. Hon: There is no question but what he was in the Coast Guard, is there, Mr. Gallagher?

Mr. McHose: You are going to cover that by your evidence.

Mr. Hon: We can cover that by evidence, your Honor.

The Court: There is some reference in the briefs as to the authority of a non-commissioned officer to make these inspections. Is that involved in this transaction?

Mr. Gallagher: It is indirectly. The statute provides who may board vessels for the purpose of inspecting them.

The Court: Then, we will get to that later? [19]

Mr. Gallagher: Yes.

The Court: Then, article ten.

Mr. Hon: I imagine they will want evidence on that.

Mr. McHose: I think we can stipulate that the accident occurred in navigable waters of the United States and that it is within the admiralty jurisdiction.

Mr. Hon: We will stipulate the ocean is navigable.

Mr. McHose: Well, that is an important point.

Mr. Hon: Yes; I will stipulate to it, your Honor. The rest I can offer evidence on.

The Court: Have we covered everything?

Mr. McHose: I think all of the rest of it is evidentiary. Don't you, Mr. Hon?

Mr. Hon: Yes; I think so.

The Court: Now, No. 11.

Mr. Gallagher: That is all evidentiary; in other words, there are issues on that and issues on twelve.

Mr. Hon: In article thirteen, your Honor, at line 10½, I would like to amend that figure from "35" to "36 feet 7 inches."

The Court: You state "approximately." That would cover it, wouldn't it?

Mr. Hon: Yes; I guess it would, although the testimony will show the other. I will withdraw my offer on that because I did say "approximately." [20]

The Court: Fourteenth?

Mr. Hon: Article fourteenth is a question of the injuries. I have here, your Honor, from the United States Naval Hospital one of the officers in charge of the medical reports. He has the original here. And I also have a certified copy of it, which I have exhibited to counsel, but we were looking at it at the time the court took the bench and I don't think we have come to any stipulation as to what we can do in that respect.

Mr. McHose: We can probably stipulate to it.

Mr. Hon: To let the certified copy go in?

Mr. Gallagher: So that the officer can go. And, when you say you have a certified copy, do you mean you have a three-page typewritten document? Is that right?

Mr. Hon: What I have, I will show you.

Mr. Gallagher: I have no objection to it.

Mr. Hon: Do you have any objection to it, Mr. McHose?

Mr. McHose: No.

The Court: What are you going to do with these exhibits? Are they going to be introduced as exhibits now?

Mr. Gallagher: Yes, your Honor. He has a certified copy. That is for the purpose of permitting the naval officer to go back to his duties.

The Court: Just what stipulation do you enter into with respect to this? [21]

Mr. Hon: I will state it and, if it is incorrect, I am sure Mr. McHose and Mr. Gallagher will correct me.

Could our stipulation be to this effect, that, if someone from the United States Naval Hospital were to take the stand, he would testify—

The Court: He is here now. You might as well use the name.

Mr. Hon: What is your name?

A. Mr. Hull: Ensign Hull.

The Court: You might say he is deemed to have testified whatever you are going to stipulate to.

Mr. Gallagher: I don't think so. I don't understand this gentleman ever treated the libelant personally. So all he could do is to say, "I have brought with me the original record kept by the Naval Hospital in reference to this libelant's case," and that "Here is the original and I have checked a copy of it and this is a copy of the record."

Mr. Hon: Yes. And I will ask you to stipulate that, if he took the stand, that would be his testimony. And you have no objection to the certified copy being introduced as an exhibit in the libelant's case, is that right?

Mr. Gallagher: I don't think it is even necessary for the man to take the stand. So far as I am concerned, I accept the fact that he has brought the original record and I stipulate with you that the certified copy that you want to [22] offer is a certified copy.

Mr. McHose: And I so stipulate, too.

Mr. Gallagher: I won't stipulate that he could testify to anything that happened to this libelant while he was in the hospital.

Mr. Hon: Oh, no. I will offer this certified copy as Libelant's Exhibit A, your Honor.

The Court: In accordance with the stipulation?

Mr. Hon: The stipulation. There is no objection to it being introduced, is there?

Mr. Gallagher: Not in so far as it is a correct copy of the record. I will come out of the bush and let you know exactly what my position is.

The Court: Let's not get into an argument as to the contents of that document as to which the witness cannot testify.

If you confine your stipulation or offer to this as being a certified copy of the document, as being a certified copy of the original in the files in the Navy, that is about as far as you can go with that document, I imagine.

Mr. Gallagher: Yes, your Honor.

Mr. Hon: Your Honor, if there is any question about it being read into evidence, then it would be worthless just to have the stipulation.

The Court: If it is offered in evidence now— [23]

Mr. Hon: I will offer it in evidence as an exhibit, which would entitle me to read it into the record. And I so offer it at this time.

Mr. Gallagher: Will your Honor permit us to read this? We were interrupted when we were about half way through it.

The Court: Yes.

Mr. McHose: Did you endeavor to get the X-rays in this?

Mr. Hon: Yes, and they are no longer at the U. S. Naval Hospital. He says they have been transferred to the Arrowhead Springs Hospital.

Mr. Gallagher: I have no objection to this being introduced in evidence, your Honor.

Mr. McHose: We haven't, either, your Honor. It apparently is an actual record of what the Navy treatment consisted of and what happened.

The Court: It may be received as Libelant's Exhibit 1.

Mr. Hon: And at the appropriate time I will ask permission to read it, your Honor. May I inquire from Officer Hull, your Honor, where I might be able to get the exact location of that and the name of the place?

Mr. Hull: I don't have it now. If you will call me up, I will give it to you. Call me at the Naval Hospital.

Mr. Hon: At the noon hour?

Mr. Hull: Any time. You can call me at any time.

Mr. Hon: I will call you during the noon hour and you [24] have that information for us. May this witness be excused to return to his station?

The Court: He may be excused. This is a transcript of the medical record of the United States Naval Hospital?

Mr. Hon: That is right, sir. I suppose that will take us to article eighteenth because fifteenth, sixteenth and seventeenth deal with his injuries and damages.

Mr. Gallagher: I don't think eighteenth has any materiality, your Honor, because this is a libel in personam and we have answered so far as the Tide Water is concerned. That allegation is ordinarily inserted in a libel where you are proceeding in rem.

Mr. Hon: Yes. And nineteenth you have answered, I take it.

The Court: Nineteenth?

Mr. Gallagher: We have both, of course, assumed up to now that the premises are within the jurisdiction of this court. Are you raising a question about it?

Mr. Hon: No.

Mr. McHose: We don't admit they are true.

Mr. Hon: What about twenty, transacting business?

The Court: Article twentieth?

Mr. Hon: I think that is covered. They admit they are corporations and transacting business within the jurisdiction of the court. They have given the court jurisdiction by ans- [25] swering, anyhow.

The Court: There is no question about the jurisdiction, is there?

Mr. McHose: We stipulated to that a few minutes ago.

The Court: The jurisdiction of this proceeding?

Mr. McHose: Yes.

Mr. Gallagher: If the court has no jurisdiction, neither side could confer it by stipulation.

The Court: Neither side questions that, do you?

Mr. Gallagher: I think the court has jurisdiction.

The Court: We might proceed now.

Mr. Hon: May I make an opening statement, your Honor?

The Court: Yes.

Mr. Hon: May it please the court and counsel, briefly, your Honor, in view of the type of this case and the testimony we intend to offer, I would like to give the court just a brief outline of what we expect to prove. We will show that David Richardson, on August 6, 1944, at that time about 22 years of age, was a member of the United States Coast Guard; that three or four months prior to this accident he had been assigned to the L. A. Harbor territory. He had been in the Coast Guard about two years prior to that. And his duties were to act as guard and also to inspect ships that were in the

L. A. Harbor. We will show your Honor that, on the evening of August 6, 1944, he received his orders from the officer of [26] the day, which included, among other things, to make an inspection of all the ships that were docked in the Bethlehem Steel Company's yards. We will show that—or I think the stipulation shows that the S. S. Frank Drum at that time was owned by Associated Tide Water Oil Company, a corporation, and certain repairs were being made on this boat by the Bethlehem Steel Company, a corporation. David Richardson, the libelant, received his orders at about 10 or 15 minutes before the accident and went directly to the gate of the Bethlehem Steel Company's yards and showed his I. D. card or his identification papers, signed the log, and was admitted to the yards. We will show further that, when he got to the gangplank of the S. S. Frank Drum, there was another civilian guard there that waved him onto the boat; that this young man, in performance of his duties, went aboard the S. S. Frank Drum, and, in obedience of the officer of the day or his C. O., his duties were to make a complete and full inspection of this ship, along with other ships that were docked at that place. These inspections included going over the entire ship and inspecting for fire hazards, fire extinguishers and sabotage, and, also, it was his duty to take a report from the officer in charge of the vessel.

We will show that at the time he went on the S. S. Frank Drum the only light that was lighting the entrance from the gangplank was a small light that was tied to the gangplank of [27] the vessel or right where the gangplank connects with the vessel. He entered onto the boat from the starboard or the right side of the boat at about 'midship. The boat was dark. He looked and

made an immediate search for the man in charge or someone in charge and, to all appearances, the boat appeared to be deserted; in other words, there was no one present. So he immediately went about following his orders to make an inspection of the ship and, also, if he could find the man in charge, to take his report.

After ascertaining that no one was in the vicinity of the gangplank, or he could see no one on the boat, he started out to make his inspection. In doing this, he went to the rear of the boat, which I believe they call the aft, and entered an enclosed passageway. This enclosed passageway entered from the right side of the boat. It makes a half circle around the rear of the boat or a horseshoe, and on either side of the passageway were different quarters or different rooms, which I don't believe are material to this case. The passageway was lighted. When he gets to the left side of the boat or the port side, that ends that passageway. He has made his complete half circle. So he finished his inspection in this place. There is a door leading out to 'midship from the port or the left side. Well, it is not a door. There is a passageway and the only door that is there is just a canvas flap that you pull back with your hands and step out. [28] So he reaches this left side and then he starts to go out and takes one step out into the ship where it is dark. There is a coaming or a threshold which is about eight or 10 inches high. He steps over that and then starts to go to his right along the bulkhead to inspect fire extinguishers that would be up probably a little above his head, and takes one step to his right, and, in taking that one step, he steps into a bunker hatch and falls straight down at a distance of 36 feet and 7 inches.

We will show your Honor that this bunker hatch was of the approximate dimensions of four feet by possibly five or six feet and the depth that I have stated, 36 feet and 7 inches; that it was completely dark where he stepped into it. There were no guards whatever surrounding the bunker hatch. The lid was off and had been left off two or three days; that there was no protection whatever for this young man in inspecting that ship; that the Bethlehem crew had worked on that ship and had worked on this particular bunker hatch.

This accident happened at about 9:05 p. m. on Sunday. I think the evidence will show that the Bethlehem people concluded their work at 4:00 p. m. on Saturday and that someone left the lid open, left the lid off and without guarding this bunker hatch, and that it had been in that condition several days, or at least three days, prior to this accident.

We will show that these respondents in the case knew that [29] the ship was to be inspected at regular intervals by the Coast Guard for the purposes which I have enumerated and that, regardless of their knowledge in this respect, they took no means whatever to guard the ship in this respect, for the safety of people that they knew would be on there for the purpose of inspecting it, and that it was through the joint negligence of both these respondents that this man has received injuries which we claim are permanent for life.

We will show that as to respondent Tide Water, in working this hatch, it was left open by them 29 hours before the accident happened. As to the Tide Water Associated, the two men in charge of the boat, two of the men, admitted that it had been open at least three days before the accident happened. We will have testi-

mony to that effect. We will show that the boat had a stand-by crew—I think that is what they call it—of three men. Just what their titles are I am not able to say at this time, but they had their technical titles, with a man in charge and two others. We will show they were employees of Tide Water Associated Oil Company and that they were in charge of that boat and that they were paid by the Tide Water Associated. I think as to Tide Water, it will make a perfect case of *res ipsa loquitur*.

As to the injuries, we will, of course, show that this young man fell straight down 36 feet and 7 inches and landed in a sitting position and that, as a result, he had a very [30] badly fractured femur, the biggest bone in the body, and that, for approximately nine months, he was in four or five different casts. In other words, he would have a cast on for two or three months and take it off and put on another one, a cast extending from the waist line down to the right foot, and, even after he was taken out of the casts, that he was a patient up at Arrowhead Springs, recuperating in the Hospital for the Coast Guard. And, in November of 1945, we will show your Honor that this condition was such that he was no longer fit for the Coast Guard service and they gave him a military discharge. And we will show that, as a result of this accident, since the accident, he has been unable to carry on any gainful occupation. The young man lives in Graceville, Florida; that he lives there with his wife and his two children and came here purposely for this trial. And we will show that he has a permanent partial disability that will prevent him from carrying on any particular trade. We will show that he is a young man who had finished the tenth grade and had

a portion of the eleventh grade; that, before volunteering for the Coast Guard service, he was employed as a machinist's helper and at that time was making, I think, about 88½ cents an hour; that that same work today pays about \$1.31 an hour. But we will show he is unable to carry on that or any occupation requiring labor and he will be forced to rehabilitate himself by learning something that [31] doesn't require exertion.

That, briefly, is the evidence we expect to prove.

The Court: We will take a short recess.

(Short recess.)

The Court: Do you desire to make a statement now or wait?

Mr. McHose: May it please the court, I think it may be helpful if I did make a brief statement. This is a suit in admiralty and I assume the court is familiar with the fact that there are certain differences in the law of admiralty to the ordinary law of negligence. This case is, essentially, a negligence case but, under the law in admiralty, there is one difference about contributory negligence. Is the court familiar with the comparative negligence doctrine?

The Court: You may go ahead with your statement.

Mr. McHose: I thought it might help now to explain it to you, so you will have it in mind.

The Court: I have read over your briefs.

Mr. McHose: We didn't go into this in our pre-trial memorandum. The doctrine, which is quite well established in admiralty, is simply this, that, if a person is negligent and is injured as a result of the negligence, he is not barred from recovery as he is under our California rule of contributory negligence, but the court is empowered to assess the weight or the severity of the

negligence of which the per- [32] son has been guilty and it diminishes the damages by the amount it fixes as the responsibility of that person as against the responsibility of the owner of the premises. That is one of the main points to have in mind in this case.

We are satisfied that the evidence will show that Richardson was very negligent; that the evidence will show he boarded the ship at night, on a dark night, and he proceeded to walk out on the deck of this tanker, which was in a shipyard undergoing repairs. He knew that it was undergoing repairs and yet he walked out, on a dark night, without any light, and proceeded to walk along and fell into this open hatch, which is something that is customary on board ships that are in shipyards undergoing repairs. If he had not fallen in the open hatch, he might have tripped over one of the pipelines that runs along over the deck of the tanker. He might have tripped over one of the large valves. He might have tripped over one of the hatches or might have fallen into other openings on that deck. And we believe the court will almost be able to decide, as a matter of law, that he was negligent, before this case is concluded. We believe that the court can decide that the accident was caused by Richardson's own negligence and that there was no negligence on the part of the ship or the shipyard.

The Court: Do you mean to say that, where a man boards a boat of that kind undergoing repairs, it is a negligent act [33] on his part in so doing?

Mr. McHose: Not in boarding the ship, your Honor, but he could have kept in part of the ship which was lighted, and what he did was to walk out on the dark deck of the ship, without any light. That is what the evidence will show. And Mr. Hon has outlined gen-

erally he did go through the opening out on the deck and then started to walk across, and we will show it was quite dark out there and that he came out of a lighted room and, without looking where he was going, he stepped into this opening. That will establish, we believe, negligence on his part. And, even if you should decide that there was negligence on the part of one or the other respondents, we believe you will diminish the amount of his negligence in comparison with the other negligence.

The other matter which will also be involved in this case is the rule, well established and settled by the cases for many years, that joint tort feasons may be held jointly responsible for an accident. If you should find that the Bethlehem Steel Company was negligent and you should also find that the ship was negligent, then it would be within your province and it would be customary under the admiralty law for you to take whatever damages you found, first, diminish those damages by the proportionate negligence of the libelant and then divide the balance between each of the two respondents. You have that power under the admiralty rule if [34] you should conclude at the end of the trial of this case there was negligence.

The Court: That is, it would be a separate judgment, is that the idea?

Mr. McHose: It would be a judgment against each of the parties separately.

The Court: It wouldn't be a joint judgment for both for the entire amount?

Mr. McHose: The order could be specifically that each would pay one-half of the total damages. I don't want to mislead the court by that statement to make you

think that either of us concedes that there is any negligence.

The Court: I understand. You wouldn't be here defending your client if that were the case.

Mr. McHose: That is true. I think the evidence will show that the ship was in the shipyard undergoing repairs. In doing some of the repairs, it was necessary for the Bethlehem Steel Company to send their workmen into what is known as the port bunker hatch. A bunker in an oil tanker, as your Honor probably knows, is a compartment in which fuel oil is carried. The ships supply fuel oil, which is used to make a ship go, in distinction from the ordinary cargo, although cargo is sometimes carried in a bunker hatch. It is one of the compartments on a ship in which fuel oil is carried. And some of the repairs which were being made con- [35] sisted of work on two plates in the skin of the ship and, in order to get to those plates to do welding and other work on them, it was necessary to go down into this port bunker to do that work.

Your Honor probably also knows that on an oil tanker, when work is done down in one of the compartments where oil has been carried, it is most important to have that compartment what we call gas free. It, first, must be wiped down carefully with rags and gasoline and cleaned out, and it is steamed, or, rather, I got my order wrong. It is first steamed and then wiped down and, after a time, a chemist goes down and makes a test and, when he determines that the bunker is safe for men to work in or safe for fire to be used, he issues a chemist's certificate, called a gas free certificate, and that had to be done in this case. And then, after the bunker had

been gas freed, it was most important to leave ventilation so that the air would circulate down there. If the hatch had been closed, gas would have generated and it would have been unsafe to work.

The Court: Was this work going on or had the work been completed in this place?

Mr. McHose: The evidence will show the work had not been completed. The shipyard obtained a gas free certificate on the 3rd of August and began work that day, and they had about five days' work to do the job in the bunker hatch, and [36] they worked on the ship. They worked about 10-hour shifts a day. So they worked those regular shifts, beginning on the 3rd, up to the afternoon of Saturday the 5th. Then we left the ship on the afternoon of Saturday the 5th and we didn't return to the ship to resume work until Monday morning, after the week-end was over. That was in accordance with the way in which the yard was working at that time. We left the ship about 3:30 in the afternoon on Saturday and it was at 9:30 or thereabouts on Sunday evening when Richardson boarded the ship and fell down into the bunker hatch. We feel it was customary and proper to leave the bunker hatch open for the purposes of ventilation. We also are in this position, your Honor. This accident happened on August 6, 1944, and we employed thousands of men at the shipyard and did particularly during the war. This accident suit was not filed until July, 1945, nearly a year later, and we were somewhat at a loss as far as getting evidence from people who were working on this job at the time it happened. So we have very little evidence as to what happened. We don't know who opened the bunker hatch as far as we were concerned. We had nothing to do with the

bunker hatch. We were doing no work on it. We were merely using it as a door, so to speak, or a means of ingress and egress from the bunker, in which we were doing our work; and, when our workmen left the ship on Saturday, presumably, it was open. It should have been open during all the time this work [37] was going on but I don't think we had anything to do with opening it, and we certainly wouldn't have closed it because it shouldn't have been closed. So we left it just the way it was. And then, on Sunday night, this man fell down in it. We feel there was no negligence on our part.

With respect to the Tide Water Associated Oil Company, they had men on the ship all day Sunday and that shouldn't have been closed. I say it shouldn't have been because it should have been left open for ventilation and had to be open for ventilation. The court, I think, will agree, when the trial is over, that there was no negligence on the part of the Associated Oil Company there.

But I did want to emphasize those two defenses between the admiralty law and the ordinary law, first, the doctrine of negligence and, second, the fact, if you do find negligence against the respondents, you can divide the damages between the two.

The Court: When was this lawsuit filed?

Mr. McHose: I think in July, 1945.

The Clerk: June 25, 1945.

The Court: What was this complaint that you filed in October?

Mr. Hon: That was an amended complaint.

Mr. Gallagher: They started on the law side, your Honor, and then switched to the admiralty side because of a [38] question of venue.

Mr. McHose: I think that is all I have to say, your Honor.

Mr. Gallagher: If your Honor please, I have only a few things to say. No. 1, the evidence in this case will show, I think, to your Honor's complete satisfaction, that the route which this young man chose of his own volition was over a part of the ship which nobody in his right mind would contend was a passageway or a place entitled to be walked upon. In other words, the evidence will show, without any conflict whatever, that the area 'thwartship at the place where this accident happened was cluttered up with permanent fixtures consisting of valves and valve handles, hatches and pipes of various sizes, some quite large.

And the evidence will also show, in addition to the fact that nobody would expect anybody to be walking in and about that part of the ship at all for any purpose, that this young man came aboard and walked from a place which was lighted out into a place which he knew was dark. He didn't even use a flashlight. He didn't light a match. He didn't even hesitate to give his eyes any chance to accommodate themselves to the difference between the light and the dark but immediately, on coming out of the passageway and without taking the slightest precautions for his own safety, he started walking from one side of the ship to the other. [39]

The evidence will show that he couldn't possibly have been walking in a normal manner, as your Honor would be walking along, lifting your foot off of the ground two or three inches, because it was absolutely essential for him to raise his foot off the surface of the deck at least six or eight inches in order to get it up over the coaming of this particular bunker hatch into which he fell.

So far as that particular bunker hatch is concerned, I also want to call your Honor's attention to the proposition that the ship, from the time it was turned over to the shipyard for repairs, was dead; in other words, there was no power being generated aboard the ship. It was necessary to get whatever lights were needed from shore and the shipyard furnished lights for the rooms or cabins in the ship.

At the time the ship was turned over to the shipyard, this bunker hatch was open for ventilating purposes but it was on what is called a stiff leg; in other words, the bunker hatch cover was at an angle of about 45 degrees to the surface of the deck, and it was held in that position by a piece of steel or iron which was used as a prop, and around that were ropes so that it was guarded at the time it was turned over to the shipyard.

The work that had to be done down in the bunker hatch consisted, in part, of replacing plates and repair leaks; in other words, the salt water had been leaking from the outside, [40] when the ship was loaded, into the fuel oil and that caused trouble. That was one of the things that was to be repaired.

As Mr. McHose told your Honor, the evidence will show that it was pitch black out there and that this young man knew it.

The evidence will also show this, that, as he walked along the dock, he could see this area of the ship and he knew it was not lighted. The evidence will also show he did not ask anybody to furnish him with any light. He didn't tell anybody he was going out there and it was not a place where anybody would be expected to go any more than you would expect a man, who comes

aboard a ship, to try to slide down a ventilator, one of these large open things that comes up above the deck and provides ventilation for quarters below.

I think, with reference to the balance of the case, the evidence will show that there was an officer of the vessel aboard but he was not there for the purpose of attending to anything excepting to see that the mooring lines didn't break loose. If they broke loose while he was there or became loose, he would see that they were tied up. And, if any emergency happened, like if fire broke out on the ship, he would be there to call assistance and do what he could himself to straighten the matter out. But this young man didn't go looking for anybody. He just wandered around the ship. Ap- [41] parently, he had never been on that kind of a ship before and didn't have the slightest idea where he was going or what he was doing after he got out of this passageway. And he couldn't have been looking for any fire extinguishers because there weren't any out there.

Furthermore, the evidence will show that there were at all times involved in this litigation good and sufficient catwalks and places where he was supposed to walk, when you want to go from one part of that kind of a ship to another. In other words, there was a platform which went fore and aft. If he wanted to go aft, he should walk on the catwalk, that is, where the crew walk when they want to go fore and aft. And, if he wanted to go from one side of the ship to the other, he should go on the passageway which is raised above the deck of the tanker. And, when your Honor sees the photographic evidence that we have, your Honor will come to the conclusion, I think, that the main deck of a tanker is not a place which is furnished for the

purpose of walking around upon and nobody would be expected to use that part of the vessel for that purpose.

The Court: What kind of a tanker was this?

Mr. Gallagher: Oil; fuel oil. And I guess you would call it just an ordinary tanker. Your Honor has seen them.

Mr. Hon: Shall I proceed?

The Court: You may proceed. [42]

Mr. Hon: Mr. Richardson, will you please take the stand?

DAVID L. RICHARDSON,

the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you please state your full name? A. David Lawton Richardson.

Q. Speak loud enough so I can hear you over here. How old are you? A. 24.

Q. Where do you live, Mr. Richardson?

A. In Graceville, Florida.

Q. You are living there at this time?

A. Yes, sir.

Q. And that is with your wife and family?

A. Yes, sir.

Q. Mr. Richardson, when did you first join the United States Coast Guard? A. October, 1942.

Q. 1942? A. Yes, sir.

Q. When were you first assigned to the Los Angeles Harbor area? A. In February of 1944.

Q. You first came to the Los Angeles Harbor area and [43] the Coast Guard in February of 1944?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. What detail were you assigned to in the Coast Guard when you came out here?

A. Standing watches.

Q. Standing watches?

A. Standing watches and guard detail.

Q. Standing watch and guard detail, is that right?

A. Yes, sir.

Q. And were you on that detail under date of August 6, 1944?

A. Yes, sir.

Q. And at that time who was your commanding officer?

A. Lieutenant Gregory.

Q. On August 6, 1944, what time of day or night did you report for duty?

A. 8:00 o'clock; 8:00 p. m.

Q. That would be 8:00 o'clock in the evening?

A. Yes, sir.

Q. What orders, if any, did you get from your commanding officer?

Mr. Gallagher: Just a moment, if your Honor please. I assume they would be oral if he got any orders at all. We object to that upon the ground they are hearsay so far as the respondent Tide Water is concerned. They can't place any [44] duty on the respondent Tide Water Associated Oil Company by anything that some Coast Guard officer may have said to this man or his understanding of it.

Mr. Hon: Your Honor, the point is this. I intend to show by this that this young man was ordered by the United States Government, in a time of actual war, to go aboard this particular vessel and to make this particular inspection.

The Court: You may answer.

(Testimony of David L. Richardson)

Mr. Gallagher: An exception.

Mr. Hon: Answer the question, please.

A. Please read it.

Mr. Hon: Will you please read it?

(Question read by reporter.)

A. He told me to go aboard all vessels in Bethlehem Steel and make an inspection; that we were shorthanded and didn't have enough men to go around all ships.

Q. And what type of inspection?

A. Looking for fire extinguishers, hoses, and take a report from the mate some time when I was on the ship.

Q. Any other duties? A. No other duties.

Q. Was anything said about sabotage?

Mr. Gallagher: That is objected to on the ground it is leading and suggestive and calls for a conclusion of the witness. [45]

The Court: Sustained.

Q. By Mr. Hon: Then what did you do when you got those orders?

A. I went to the Bethlehem Steel gate and showed my I.D. card and signed the log and went on in at the gate.

Q. Then, where did you go?

A. I went aboard the Frank G. Drum.

Q. And, when you got to the gangplank of the Frank Drum, did you see anyone else?

A. There was a guard at the foot of the gangplank, in a little house right close by, and he recognized me and knew what I was going aboard for and told me to go on board.

Mr. McHose: I object to that —

(Testimony of David L. Richardson)

Mr. Gallagher: I move to strike out all of the answer from and including "he recognized me and knew what I was going on board for," and so forth, on the ground it is not competent evidence so far as the Tide Water is concerned. There is no evidence proving or tending to prove that the individual was an employee of Tide Water.

Mr. McHose: In addition, it is a statement of a conclusion of the guard, which he couldn't know.

The Court: That answer may be stricken. Start all over again.

Mr. Hon: I will start all over again.

Q. There was a guard at the foot of the gangplank, is [46] that right?

A. Yes, sir.

Q. All right. Did you look at the guard?

A. Yes, sir.

Q. Did he look at you?

A. Yes, sir.

Q. What, if anything, did the guard do?

A. Well, he waved me on board.

Mr. Gallagher: That is objected to so far as the Tide Water is concerned upon the ground that it is immaterial and there is no proper foundation laid showing or even tending to show that guard was an employee of Tide Water Associated Oil Company; and, if he was, whatever he did wouldn't be binding on us.

The Court: We don't know just yet. We don't know whose guard he was. He may tell what he did. If he is not your guard, then, of course, you may not be held for his activities.

(Testimony of David L. Richardson)

Mr. Gallagher: Well, he wasn't. That is why I made the objection.

Mr. McHose: I object to that statement. He was your guard.

Mr. Hon: This young man would have no way of knowing whose guard it was.

The Court: I would like to find out what happened there and then we can determine the legal issues afterwards, after [47] we get to that point. Whatever objections you want to make, make them and they will be in the record. What is the question?

Q. By Mr. Hon: What did he do?

A. He just waved me on board.

Q. What did you do then?

A. I went up the gangplank.

Q. Then, when you went up the gangplank, did you see any lights on the ship?

A. There was a light at the gangplank.

Q. A light on the gangplank? A. Yes, sir.

Q. Was that an electric bulb? A. Yes, sir.

Q. What was that fastened to?

A. The side of the ship, the ship's shell, right at the top of the gangplank.

Q. Was there any other light?

A. There was lights on the dock.

Q. Was there any other light what you saw on the ship?

A. No, sir.

Q. When you got onto the ship, what was the first thing you did?

A. I stopped and glanced around to see if I could see anyone on deck and, not seeing anyone, I walked onto the [48] starboard passageway.

(Testimony of David L. Richardson)

Q. You say you saw no one on deck?

A. Not a soul.

Q. Then, where did you go?

A. I went in at the port passageway.

Q. Sir?

A. I went into the starboard passageway.

Q. You entered the ship, did you, from the right side or the left side A. The right side.

Q. That would be the starboard side?

A. Yes, sir.

Q. And then you say you went into the starboard passageway. Was that to the rear of the ship or to the front of the ship?

The Court: Let me make this suggestion. If you have some map or sketch that we can look at and follow this —

Mr. Hon: I think it would be a splendid idea.

Mr. McHose: There is a blueprint of the ship *here* which should be on the blackboard.

The Court: I should think so.

Mr. McHose: I think it would be helpful to the court.

Mr. Hon: I think so, very much so.

The Court: (Referring to the blackboard): You may bring that up closer so we can get a better look at it. [49]

Mr. Hon: May I inquire what time you convene in the afternoon?

The Court: Usually at 2:00 o'clock.

Mr. Hon: The reason I ask that is this, that I am going to question him on his injuries for the next 15 minutes, and the Doctor who is going to testify is ex-

(Testimony of David L. Richardson)

tremely busy and he wants to be here at 2:00, and I might be able to call him out of order.

The Court: I think that can be arranged if he gets here at 2:00 o'clock.

Mr. Hon: All right. Then, I will have to spend about 10 minutes with this young man on his injuries before the Doctor testifies.

The Court: Is it agreed that this is a blueprint of the vessel?

Mr. Hon: Is that a bird's eye view looking down?

Mr. McHose: That is a view, as I understand it, looking down at the deck of the ship. It shows the deck plan, three deck plan views.

Mr. Hon: This is the aft right here, isn't it, Mr. McHose?

Mr. McHose: Yes.

The Court: I think we should mark this at least for identification.

Mr. Gallagher: Libelant's Exhibit 2 for identification? [50]

The Court: Exhibit 2 for identification.

Mr. Hon: Your Honor, I think that he has reference to — this would be the starboard side right here and the gangplank somewhere along in here.

The Court: When you say "here," we can't get that into the record. I think what you should do is you should take a red pencil and mark these points, whatever you think are important points, so they can be identified and we can tell about them.

Mr. Hon: Suppose I take up the injuries now and, at 2:00 o'clock, I will have my doctor.

The Court: All right; you may do that.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Mr. Richardson, did you sustain an injury that night? A. Yes, sir.

Q. Just briefly, what happened?

A. When I stepped out that door, right immediately I was just gone.

Q. You fell some distance straight down, did you?

A. Yes, sir.

Q. How far down did you fall?

A. Between 36 and 37 feet.

Mr. McHose: That is the conclusion of the witness. I don't think he knows how far he fell.

Mr. Hon: The blueprint shows it; 36-7, I think Mr. [51] McHose.

Mr. McHose: I don't know that but I am willing to stipulate he fell somewhere around that distance.

Mr. Gallagher: We don't know how far down he fell.

The Court: At any rate, you fell from where you stepped off down to the bottom of where you fell, is that correct? A. Yes, sir.

Q. By Mr. Hon: And you estimate that at around 36 feet, is that right? A. Yes, sir.

Q. In what position were you when you landed?

A. In a sitting position, kind of bent over.

Q. At that time did you feel any pain?

A. I was numb. I didn't hurt so bad right then but in a few minutes I started to hurt.

Q. And what did you do when you found yourself in that position?

A. I kind of rubbed myself around my legs and arms and, when I started to rub my leg, it caved in. When I rubbed my leg, I saw it was caved in.

Q. What part of the leg was that?

A. The femur, above the knee.

(Testimony of David L. Richardson)

Mr. McHose: Which leg? A. The right leg.

Q. By Mr. McHose: All right. What did you do? [52]

A. I hollered and whistled about four or five minutes and couldn't get no answer, and I glanced up to the skyline and I could tell there was a ladder coming down in there and I crawled over to it and started climbing and got almost to the top and thought I was fixing to faint, and I stopped and hollered some more and clumb up to the top, and, by the time I got nearly to the top, three men come up and I told them to help me out, that I had broke my leg. So two of them run out and was going to get help or something and help me out, and the other pulled me on out and helped me on out, and laid me on that deck.

Q. Where were you taken, Mr. Richardson, from there?

A. They carried me on the dock and I stayed there about an hour and a half.

Q. Were you on a stretcher?

A. On a stretcher; yes.

Q. Then, where were you taken?

A. To the Long Beach Hospital, Naval Hospital.

Q. By ambulance? A. By ambulance.

Q. What was the first thing they did for you at the Hospital? Do you recall?

A. They gave me a shot and put my leg in traction.

Q. When you say "in traction," just tell us what you mean by that. [53]

A. They put a paddle around the ankle and a weight on it and let this weight hang over the foot of the bed to take the strain off of the leg.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Mr. Richardson, did you sustain an injury that night? A. Yes, sir.

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Q. When you say "in traction," just tell us what you mean by that. [53]

A. They put a paddle around the ankle and a weight on it and let this weight hang over the foot of the bed to take the strain off of the leg.

(Testimony of David L. Richardson)

Q. Did that keep your leg suspended?

A. Yes, sir.

Q. How long was your leg in that position?

A. From around midnight Sunday to 9:00 o'clock Tuesday morning.

Q. An then what did they do?

A. They taken me to the operating room and give me a spinal.

Q. By "spinal" do you mean an anesthetic?

A. Yes, sir.

Q. Go ahead.

A. And then they operated, opened it and put a steel plate in my leg.

Q. About how long did that operation take, do you know?

A. About an hour and a half or two hours.

Q. Is there a scar on your thigh from that operation now?

A. Yes, sir.

Q. How long is that scar?

A. Nine inches on the side.

The Court: You say "on the side."

Mr. Hon: On the side, your Honor; on the side of his [54] leg.

Q. Describe approximately where that scar is. Just tell his Honor.

A. Just about midways between the knee joint and the hip joint or a little higher.

Q. And it runs straight up and down?

A. Straight up and down; yes, sir.

Q. Has that steel plate ever been removed?

A. No, Sir.

Q. How long a plate is that?

A. Eight inches.

(Testimony of David L. Richardson)

Q. That is screwed to the bone, is it?

A. Yes, sir.

Q. After you came out of the operation — or you were conscious during the operation, is that right?

A. Yes, sir.

Q. So after the operation what did they do?

A. They put me in a cast.

Q. What kind of a cast was it?

A. A Spica cast.

Q. Is that a rigid cast like plaster of paris?

A. It was a plaster.

Q. It was a plaster cast? A. Yes, sir.

Q. Just tell us where that cast was, on what part of [55] your body.

A. From my waist down all the way on my right leg.

Q. All the way to where?

A. To my toes, and there was a band around my waist I would say 9 or 10 inches wide.

Q. Did it extend down the left leg any distance?

A. No, not any distance. It just come down to where it had been injured.

Q. Did that keep your right leg rigid? Did that cast keep your right leg rigid, where you couldn't move it? A. Yes, sir.

Q. How long did that cast remain on?

A. Six weeks.

Q. That is an approximation, is it, six weeks?

A. Yes, sir.

Q. And you were in the Long Beach Naval Hospital all that time? A. Yes, sir.

Q. Then, what did they do after six weeks?

A. They taken the cast off and put another one on.

Q. Was it just like the old one? A. Yes, sir.

(Testimony of David L. Richardson)

Q. How long did they leave the cast off when they took it off? A. About an hour. [56]

Q. And then immediately thereafter they put on another one just like that, is that right?

A. Yes, sir.

Q. How long did the second one remain on approximately? A. 14 weeks.

Q. And you were still in the Long Beach Naval Hospital at the end of that 14 weeks, is that right?

A. Yes, sir.

Q. What did they do with the second cast after 14 weeks?

A. They cut it off and put another one on.

Q. How long was the second one off before they put the third one on? A. Approximately an hour.

Q. And was the third one just like the second one?

A. Yes, sir.

Q. How long approximately did the third one remain on? A. 12 weeks.

Q. And, at the end of that 12 weeks, were you still in the Long Beach Naval Hospital as you remember?

A. At the end of that 12 weeks, I was in Arrowhead Springs.

Q. What do you mean when you say Arrowhead Springs.

A. The convalescent hospital at San Bernardino.

Q. The Naval Convalescent Hospital? [57]

A. Yes, sir.

Q. How many different casts were you in following that accident? A. Four and maybe five.

Q. Either four or five? A. Yes, sir.

Q. When was the last cast taken off of your leg permanently? A. The 29th of May.

(Testimony of David L. Richardson)

Q. May 29th? A. Yes.

Q. And the accident was August 6, 1944?

A. Yes, sir.

Q. And the last cast was taken off May 29, 1945, as you recall, is that right? A. Yes, sir.

Q. Were you in the Convalescent Hospital in Arrowhead Springs when the last cast was taken off?

A. Yes, sir.

Q. Then were you able to get around?

A. Very little before the cast was taken off.

Q. What means did you use in getting around?

A. Crutches.

Q. How long were you on crutches, Mr. Richardson, after the last cast was taken off? [58]

A. Six or seven weeks.

Q. And then, after you were able to discard the crutches, did you use any other artificial means of getting around? A. I used a cane.

Q. How long did you use a cane approximately?

A. Seven or eight weeks.

Q. When did you leave the Convalescent Hospital at Arrowhead Springs?

A. July of 1945, July 26th.

Q. And then from there where did you go?

A. I went home on leave.

Q. You went home on leave? A. Yes, sir.

Q. And when did you get back?

A. The 20th of August.

Mr. Gallagher: Back where? Home or where?

Q. By Mr. Hon: Got back where? When did you get back to Los Angeles?

A. I got back to Wilmington August 20, 1945.

(Testimony of David L. Richardson)

Q. Where did you report to when you got back?

A. I, first, reported to the district office in Long Beach and they sent me over to Wilmington.

Q. And where were you stationed at Wilmington?

A. I stayed in Company A on Terminal Island. [59]

Q. Did you have medical treatment thereafter?

A. Yes, sir.

Q. How often? A. Every day.

Q. And that would be at the sick bay, would it?

A. The sick bay at Wilmington.

Q. And what kind of treatment would they give you daily, Mr. Richardson?

A. Special exercises and light treatment.

Q. Are you still in the United States Coast Guard?

A. No, sir.

Q. Do you have a discharge from the United States Coast Guard? A. Yes, sir.

Q. What type of a discharge do you have?

A. Medical.

Q. And when did you receive the medical discharge?

A. November, 1945, November 5th.

Q. November 5, 1945? A. Yes, sir.

Q. And you are now living back in Graceville, Florida, is that right? A. Yes, sir.

Q. Mr. Richardson, prior to your going into the Coast Guard — [60]

Mr. Gallagher: Pardon me. Did your Honor intend to run beyond 12:00?

The Court: I believe not. We will suspend at this time and resume at 2:00 o'clock. We will take a recess.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.)

Afternoon Session

February 11, 1947. 2:00 o'clock.

DAVID L. RICHARDSON,

the libelant, being recalled, testified as follows:

Direct Examination

Mr. Hon: Mr. Reporter, may I have the last two questions and answers, please?

(Record read.)

Q. By Mr. Hon: Prior to you going into the Coast Guard, what was your occupation?

A. Mechanical, machinery repair and helper.

Q. By whom were you employed?

A. International Paper Company.

Q. Where? A. Panama City, Florida.

Q. Just tell us generally, in your own words, what type [61] of work you did in that employment?

A. We taken out old machinery, put new machinery in, repaired old machinery and put it back.

Q. What type of machinery?

A. Motors, electric motors, reduction gears and bearings.

Q. Did that require any lifting? A. Yes, sir.

Q. To what extent? A. Up to 200 pounds.

Q. You would have to help lift up 200 pounds?

A. Yes, sir.

Q. Now, what positions would you have to be in at different times in the day in order to do this work? I mean with respect to your body?

A. Sometimes you are climbing, laying down, painting, and all different ways.

(Testimony of David L. Richardson)

Q. And what were your earnings at the time you quit to go into the Coast Guard?

A. 88½ cents an hour.

Q. Working how many hours a week?

A. 56 hours.

Q. Now, Mr. Richardson, as nearly as you can, tell us in your own words what injuries you received in this accident?

A. A sprained back and a broke leg. [62]

Q. You say a broken leg. Do you mean the femur?

A. Yes, sir.

Q. All right. Go ahead.

A. And my left heel was bruised pretty bad.

Q. What date were you discharged from the hospital, did you say? I have forgotten.

A. July 26th.

Q. 1945? A. 1945; yes.

Q. Just a few days under a year after the accident happened? A. Yes.

Q. Tell us in your own words, Mr. Richardson, what complaints you have today that are as a result of the accident.

A. My leg hurts a lot where it was broke, when I do walking.

Q. How far can you walk without your leg hurting you? A. A couple of blocks.

Q. Where do you have that pain?

A. Right about where it was broke.

Q. And what type of pain?

A. Kind of sharp stinging pain.

Q. What other complaints do you have?

A. My back, it just hurts continuously. [63]

(Testimony of David L. Richardson)

Q. What part of your back?

A. The small part, around the waistline, the small of the back.

Q. The small of the back?

A. The small of the back.

Q. You say it hurts continuously. When did the pain in the back come on?

A. Before I was out of a cast, it was numb but when I got out of the cast is when the real pain came on.

Q. You say you are never without pain in the back?

A. Never.

Q. Is it the same pain at all times or is it worse at times?

A. It is worse at times.

Q. Tell us at what times it is worst.

A. When I do walking during the day and try to do work and bending and sitting in one position too long, it goes to hurting. For 10 or 15 minutes it hurts worse.

Q. How far can you walk without your back paining you or increasing pain?

A. A couple or three blocks.

Q. What, if anything, do you do, if you walk two or three blocks, to alleviate the pain or lessen it?

A. I can lay down and rest.

Q. Mr. Richardson, what about your right leg to-day, [64] the lower leg, as compared to how it was before you had those casts put on it? Is there any difference in your leg?

A. Yes, sir. It is swelled up bad and I have a big kind of a rupture place on it.

Q. Can you show the court that place on your leg?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. Will you do that, please?

Your Honor, I would like to have him exhibit that because it is hard to get it into the record.

(The witness exhibits.)

Q. How long has that been there?

A. It was blue and busted veins there when I first got out of the cast.

Q. Was it that way when you first went into the cast?

A. No, sir.

Mr. Hon: For the purpose of the record, I would like to state that the witness shows or is exhibiting a discolored area directly above the internal mallelus, an area about five inches in depth and about two or three inches in width. Would that be correct, your Honor? And the entire surface is described as being discolored, a bluish red color.

Q. Does that give you any pain, Mr. Richardson.

A. Yes, sir; it swells up and itches.

Q. When does it swell up?

A. During the day when I am up on it. [65]

Q. Now, Mr. Richardson, would you mind stepping down just a minute, please, down here? Is there any difference in the position of your right foot or the condition of your right foot today than there was before the accident happened?

A. Yes, sir.

Q. All right. Tell the court what the difference is.

A. My right foot turns in.

Q. Your right foot turns in? A. Yes, sir.

Q. Can you turn it out?

A. I can get it about straight.

Q. When you walk, do you walk in that position, with it turned in as now? A. Yes, sir.

(Testimony of David L. Richardson)

Q. You may take the stand, Mr. Richardson. What, if any, effect does it have upon your walking or your gait?

A. It makes me stumble a lot and it gives out on me in a hurry.

Q. You have described pain in your back, which you say is constant?

A. Yes, sir.

Q. You have described the upper leg and in the ankle, in the area you have exhibited. Do you have pain anywhere else at any time?

A. My knee gets sore. [66]

Q. Which knee?

A. My right knee.

Q. Describe the pain you have in the right knee.

A. It gets sore when I do a lot of walking; a continuous grind in there. It gets sore when it is exercised a lot.

Q. What do you mean by a continuous grind. What do you mean by "grind"?

A. It just makes a grinding sound in the joint.

Q. Is that continuous or is it just once in a while?

A. It makes that grind. It is continuous.

Q. Now, Mr. Richardson, I believe you testified you received your medical discharge November 5, 1945.

A. Yes, sir.

Q. Since that time, have you been able to do any physical work?

A. I have done a little work but very little.

Q. What have you done?

A. I have helped on the farm and worked around the house.

(Testimony of David L. Richardson)

Q. Just tell the court what type of work you have been able to help your father with on the farm and how long a time did you work without a stop.

A. I would drive a tractor maybe an hour or an hour and a half at a time.

Q. Why didn't you drive it longer? [67]

A. I can't stand the ride because my back hurts.

Q. All right. What else have you done?

A. I feed the cows and hogs and change them from one pasture to another.

Q. All right. What else? A. I help fix fence.

Q. Do you mean general chores around the farm more or less? A. Yes, sir.

Q. What effect, if any, does lifting have on your condition, your back or your leg?

A. Well, I just can't lift.

Q. How much can you lift without pain? What is the most you have lifted since the accident?

A. 30 or 40 pounds, I guess.

Q. Did that cause any pain? A. Yes, sir.

Q. Now, Mr. Richardson, after you went back to Florida, did you go back to the International Paper Company, where you had worked before? A. Yes, sir.

Q. Did you ascertain what your old job is paying at this time? A. Yes, sir.

Mr. Gallagher: That is objected to on the ground it is [68] calling for hearsay.

Mr. Hon: Your Honor, I think that this witness can testify to that. Or I can get at it in another way by saying does he know what the prevailing wage is for the type of work he was doing before.

The Court: That objection is sustained.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Then, Mr. Richardson, you did go back to the International Paper Company?

A. Yes, sir.

Q. Did you do any work there? A. No, sir.

Q. Why didn't you go back to your other job?

Mr. Gallagher: That is objected to on the ground it calls for a conclusion and a self-serving declaration.

The Court: Overruled.

Q. By Mr. Hon: Answer the question, please.

A. Well, I answered that.

Q. No. Why didn't you go back to your old job?

A. I couldn't tend to the work. It was on concrete and heavy lifting and I just couldn't stand it.

Mr. McHose: I object to that statement as a conclusion of the witness. If he did go back to work and then that was the case, that is one thing, but, if he states that as a conclusion, without having gone back to the job, why I think that is objectionable. [69]

Mr. Hon: I don't think so for this reason. The witness has testified it required him to be in bent positions on the floor, climbing ladders, lifting up to 200 pounds.

The Court: Do I understand he did go back to work?

Mr. Hon: No; he did not.

The Court: Then, I think that is a conclusion. The objection is sustained.

Q. By Mr. Hon: Are you at this time able to do the type of work you were doing at the International Paper Company prior to the time you went into the service? A. No, sir; I am not.

Q. Why not?

A. I can't stand the concrete and my back hurts when I do a lot of heavy lifting and bending.

(Testimony of David L. Richardson)

Q. What effect does the concrete, or being on concrete, have on your leg or back?

A. It makes my back hurt worse and my leg usually goes to hurting and aching and swells up bad.

Q. Did your work at the International Paper Company require your being on concrete at all times?

A. Yes, sir.

Q. Mr. Richardson, do you know what the prevailing wage is, in the town where you were working, before you went into the service, for the type of work you were doing just prior to going into the service? [70]

Mr. Gallagher: That is objected to on the ground it is immaterial.

Mr. Hon: It goes to the question of damages and, furthermore, as I understand it in these maritime cases, the rules are considerable relaxed. I would like to read you just a short case on that — it won't take but two minutes — as my authority for it, because I think it is very important, if I may do so.

The Court: What objection is there to establishing that rate at that time, that is, before the accident occurred?

Mr. Gallagher: It goes into the realm of speculation and surmise. There is no certainty at all that this company would have hired him.

The Court: He is merely going to state the prevailing rate at the time he went into the Coast Guard.

Mr. Gallagher: No; now, after he is out of the Hospital.

Mr. Hon: I am talking about now, what it is after he got out of the hospital, to show what the man is losing by way of earnings at this time.

(Testimony of David L. Richardson)

The Court: What is the measure of damages? At the time of the accident or at present?

Mr. Hon: It is the rate he could be making.

The Court: Have you any authority?

Mr. Hon: Yes; I have, your Honor. This is taken from [71] the case *Minnesota Steamship Company v. Lehigh Valley* and so forth, 63 CCA 672.

"In the trial of an admiralty cause—"

Mr. Gallagher: What is the Federal Reporter?

Mr. Hon: 129 Federal, 72.

"In the trial of an admiralty cause, where the testimony is taken before the court, all testimony offered, though objected to, should be admitted, subject to the objection, for the benefit of the appellate court; unless so utterly immaterial and irrelevant that there can be no question of its admissibility."

As I understand, the reason that the rules are relaxed to that extent is because, on appeal, these cases are really heard *de novo*.

The Court: Is that with reference to a matter of this kind?

Mr. Hon: The admiralty cases in general.

The Court: Do you mean the doors are wide open in all respects?

Mr. Hon: Yes, your Honor.

The Court: What are the facts in that case?

Mr. McHose: Is that a District Court case?

Mr. Hon: District Court.

Mr. McHose: What Circuit?

(Testimony of David L. Richardson)

Mr. Hon: It is 63 CCA. I don't know the facts at hand, [72] your Honor. But I will give you other cases, though, in admiralty.

"The court is not bound by all the rules of evidence followed in courts of common law and, where justice requires, it may take notice of matters not strictly approved."

It even goes that far. That is the case in 261 Fed. 285. I quote these to show you how relaxed the rules are. Another case is found in 11 Fed. (2d) 466, which states, "Common law rules of evidence do not apply in suits to recover damages for a maritime tort." So, then, in a case of this nature, unless the testimony offered is so utterly disconnected with the issues of the case, as I take it, the court may accept the evidence subject to the objections of counsel. Those cases I will be glad to get for you.

The Court: What objection, generally, is there to evidence of this kind? How else are you going to prove the loss of earning power?

Mr. Gallagher: Well, your Honor, the man specified what he was doing before he went into the Coast Guard and how much he was making. That is direct evidence of a fact. I don't think in admiralty or in any other case any plaintiff is entitled to prove what a job that he used to have is paying at the time of the trial because there is no certainty, not even any reasonable certainty, that he could be working in that place. Therefore, it goes into the realm of surmise and con- [73] jecture. There is no evidence here showing that this company that he used to work for would have anything to do with him now.

(Testimony of David L. Richardson)

The Court: Suppose he had worked for himself in that particular line, that that was his vocation before, and he is prevented, we will say, from doing that type of work, which at the present time is worth so much.

Mr. Gallagher: You might have the converse of it. Suppose wages went down in the meantime. I don't think any court would permit you to prove the wages had been reduced.

Mr. Hon: It would be a matter of defense, your Honor, in mitigation of damages, if they had gone down.

Mr. McHose: My feeling in this matter is that it is very speculative evidence. I grant, Mr. Hon, that the rules of evidence are somewhat relaxed in admiralty and the court is not required to be as strict about the admission of evidence as on the common law side of the court. The cases that he read are not cases that go to the question of the evidence which is here before your Honor. I think it is highly speculative and immaterial for that reason. And the court can decide, if you should decide that damages should be awarded in this case, what the damages might be, and I don't think it is going to help you to know what wages might be paid in some industry back in Florida, in which he might or might not be working if he hadn't been injured. [74]

The Court: We will see if it is speculative or not. Here is a man who says he was injured and, as a result of those injuries, he is unable to carry on his accustomed work and he says he was permanently injured, or practically so, in that respect. How are you going to determine whether or not he is able now to carry on the work? Suppose that he is able to do part-time work at this time. He certainly ought to be able to show what he would be able to earn at this time if he carries on part-time work

(Testimony of David L. Richardson)

in a similar line or if he is able to do part-time work. I think it is admissible for that purpose. Will you answer the question, Mr. Richardson?

A. Ask it again, please.

Mr. Hon: Will you read the question, Mr. Reporter, please?

(Question read by reporter.)

Q. In other words, what are the prevailing wages today for that same type of work?

Mr. McHose: May we ask the witness a question on voir dire?

The Court: Yes; you may.

Q. By Mr. McHose: What did you do to try to find out what wages you were being paid when you went back there?

A. I went to my old boss and millwright foreman and talked to him. [75]

Q. And your information then is based upon a discussion you had with someone in this company?

A. My boss; yes, sir.

Q. And what did you ask him?

A. I asked him what the old job I had was paying now.

Q. Did you tell him that you wanted to take your old job back?

A. I told him I would like to take it.

Q. You did want to take it back? A. Yes, sir.

Q. Your information, then, is based on just what he told you?

A. There were two or three more old guys that was there when I was, that I asked, and they told me the same thing he did.

(Testimony of David L. Richardson)

Mr. McHose: I think that evidence would be objectionable as hearsay, if that is the case, your Honor.

Mr. Hon: Your Honor, he brought out the hearsay and I think it is certainly admissible.

Mr. McHose: He is basing his testimony here on a situation which we obviously cannot check and have no means of testing and making a statement based entirely upon what someone told him, which I think is hearsay and inadmissible.

The Court: How else are you going to establish a prevailing wage except what he is able to ascertain from others who [76] are working in similar capacities and what the former employer might say in the matter, even though it may be, from one point of view, hearsay? He is not detailing conversions.

Mr. McHose: If it is important to establish, your Honor, and prove what it is and give us the opportunity of cross examination. That is the reason for the objection of hearsay. But we have no means of checking whether the statement he makes here in court is correct or not, and I think we are entitled to stand on our hearsay objection.

Mr. Gallagher: There is also another reason for it, your Honor. We all know, as a matter of common knowledge, that most industries have become unionized to a greater extent in the last three or four years than they were before the war. If this man should be required to join the union in order to get that job, that would be something we could ascertain from the employer if we took the employer's deposition. We could also ascertain whether he could become a member of the union. Sometimes they can't get into these unions and,

(Testimony of David L. Richardson)

if they don't belong to the union, they can't get a job. It is all speculative and we have no way to test it. We can't cross examine this man on any subject connected with what somebody told him. Therefore, he shouldn't be permitted to repeat hearsay or information based on hearsay.

The Court: You can rebut with evidence that is available to you. [77]

Mr. Gallagher: How can we do it here, your Honor? Here is a conversation in Graceville, Florida. How do we know that the man is even alive today or, if he is alive, if he is there? I don't think that parties to a civil suit should be compelled to fly to Florida to check up on whether or not this man is telling the truth or not.

Mr. Hon: Of course, your Honor, you have got one other situation. I think the court will take judicial notice of this fact, that any veteran leaving the service is entitled to his old job back that he would have had had he stayed on the job.

Mr. McHose: That has nothing to do with the point we are making. Our sole objection is that this is an attempt to introduce evidence by hearsay. If the evidence is important, and I don't think it is, you could have gotten the evidence by going direct to the employer and obtaining testimony as to what the rate is. But they haven't done that and now they are attempting to get this testimony into this record by hearsay testimony, and we feel that is definitely contrary to all the rules of evidence.

Mr. Hon: We only have this situation in that respect, your Honor. He went back to his old job back and found out he wasn't able to take it back, and he can

(Testimony of David L. Richardson) •

at least say what the job is paying. That is all I am asking.

The Court: At least it is admissible for the purposes [78] stated by the proctor for the libelant. He states, if that is the situation, that the appellate courts have held that, if information is required —

Mr. McHose: If you analyze those cases, your Honor, you will not find that they go that far and that, also, it is quite true in admiralty, as in any other branch of the law, hearsay testimony is not admissible. It is not proper or right to subject us to the position of having to submit positive testimony.

Mr. Hon: I would like your Honor to read that case, if you want to reserve your ruling on the objection.

The Court: I will let the evidence go in subject to your motion to strike after I have given the matter some more consideration.

Q. By Mr. Hon: What does the same job pay now in that vicinity? A. \$1.31 an hour.

Q. Now, I will ask one other question which I am sure there will be no objection to. You don't work 56 hours at \$1.31, do you? You only work 40, is that right? A. Only 40 hours.

Q. You found that out, didn't you?

A. Yes, sir.

Q. Mr. Richardson, how is the pain in your back today compared to what it was when you received your medical dis- [79] charge from the service?

A. I would say it is twice as bad. I can't walk or do no work at all hardly now.

(Testimony of David L. Richardson)

Q. How does the condition of the leg compare to what it was when you left the service?

A. It is swelled up worse than it did and it is always breaking out.

Mr. Hon: Is Dr. Molony in the court room? Could I call the doctor now?

The Court: Yes.

Mr. Hon: You may step down.

The Court: Have you any objection to his being called out of order?

Mr. Gallagher: I have no objection.

Mr. McHose: No objection.

WILLIAM R. MOLONY, JR.,

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Hon: Will you please state your name?

A. William R. Molony, Jr.

Q. What is your business or occupation, Doctor?

A. Physician and Surgeon; MD.

Q. Of what school or schools are you a graduate?

A. I graduated in medicine from St. Louis University. [80]

Q. What year? A. 1927.

Q. What degree or degrees do you hold?

A. I hold a B.S. and M.D.

Q. B.S. stands for Bachelor of Science and M.D. for Medical Doctor? A. That is right.

Q. Did you serve an internship? A. I did.

(Testimony of William R. Molony, Jr.)

Q. Where did you serve your internship?

A. In the Santa Fe Hospital at Los Angeles.

Q. How long an internship did you serve?

A. I had a year's internship and several months of residency.

Q. Are you admitted to practice your profession in the State of California? A. I am.

Q. When were you admitted? A. In 1927.

Q. Have you practiced your profession continuously in California since that date?

A. Yes, except for my military service.

Q. Has that been in Los Angeles County?

A. In Los Angeles County.

Q. You speak of your military service. Will you please [81] tell the court what military service you are referring to?

A. I was in the United States Navy.

Q. In this last war?

A. In this last war, from March 27, 1943, until June 1st of 1946.

Q. And what was your rank, sir?

A. I entered as a lieutenant commander and finished as a full commander.

Q. And what particular branch of the Navy were you attached to?

A. I was in the Medical Department. I was in the orthopedic department of the United States Navy. I acted as an orthopedist all during the war.

Q. Doctor, do you specialize in your profession?

A. I do.

Q. What is your specialty?

A. Orthopedic surgery.

(Testimony of William R. Molony, Jr.)

Q. For how long has that been your specialty?

A. Since 1932, I have devoted my full time to that work.

Q. When you say orthopedic surgeon, will you tell the court, in layman's language, what that means?

A. It means the care and diagnosis and treatment of bones and joints, and their associated membranes. My work covers or is chiefly traumatology, taking care of the results [82] of trauma, and by that I mean fractures and severe injuries to tissue. Also, we take care of disabilities that result from deformities such as follow poliomyelitis and the technical care of congenital deformities, such as club foot. I think that covers it.

Q. Doctor, where were you stationed during your period with the United States Navy of service?

A. That is a long story.

Q. Then, I will be more specific. Where were you stationed in August of 1944?

A. I was at the Long Beach Naval Hospital. I was assistant chief of the orthopedic department at Long Beach, California.

Q. During your —

A. Or in 1944, did you say?

Q. 1944.

A. In 1944, I was stationed over in Pearl Harbor at the Naval Hospital there.

Q. And when did you come back to the States from there?

A. I came back to the United States March 1, 1945.

(Testimony of William R. Molony, Jr.)

Q. Did you, while you were in the United States Navy, have occasion to examine David Lawton Richardson, the young man who just left the witness stand?

A. I did; yes. [83]

Q. And you saw him in a professional capacity, I take it?

A. I did; yes.

Q. Where was he when you saw him?

A. At the Long Beach Naval Hospital.

Q. And do you know when it was you saw him?

A. September 15, 1944, was the date.

Q. You have seen the medical record that I gave you a copy of, is that true?

A. I have; yes.

Mr. McHose: Do you refer to a transcript?

Mr. Hon: Yes. His name appears on there.

Q. How many times did you see him?

A. I saw him, in consultation, on that day.

Q. And you were in consultation with whom?

A. I can explain it this way. Men, in various units, having something which their respective medical officers feel is beyond their capacity for diagnosis or treatment, are sent to institutions such as the Long Beach Naval Hospital for consultation and examination and recommendations for treatment. Also, they frequently are sent there for diagnosis. And it was in that capacity that I saw Mr. Richardson.

Q. What was his condition. What did you observe in his condition at that time?

A. What is that, sir? [184]

Q. What was his condition? What did you find him suffering from at that time?

A. He came in complaining of his right leg and his back and X-rays were taken at that time.

(Testimony of William R. Molony, Jr.)

Q. What is that?

A. I say we took X-rays at that time that he came in and found that he had a fracture of the right femur, which was healed and held together by a plate. The plate was in good condition.

Q. What is the approximate size of that plate?

A. I really couldn't tell you. It is about an 8-holer.

Q. 8-holer?

A. Well, I would say it is about a 6-inch plate that is used on the femur.

Q. And what type of plate is it?

A. That was a vitallium type of plate.

Q. That is metal, is it? A. Metal; yes, sir.

Q. What is the plate fastened to?

A. The plate is fastened to bone.

Q. By what means?

A. Of metal screws of the same material, vitallium. In this particular case I believe there were seven screws.

Q. I believe you testified he was complaining of pain at that time in the leg and the back? [85]

A. Yes.

Mr. McHose: May I get this date again?

A. Yes, sir; September 15 of 1945. At that time we took X-rays and we found this fracture to be well healed and, on further examination, I found that he had an atrophy of his right thigh of about an inch and a half.

Q. What do you mean by atrophy?

A. Atrophy means that there is a decrease in the average size of his thigh. In other words, the muscles by lack of use or for other reasons are not as well developed as they would be under normal circumstances. Therefore, the circumference of the thigh at that point is less than

(Testimony of William R. Molony, Jr.)

the normal, assuming that the other side is a normal thigh, on the opposite side.

Q. You didn't give him any treatment, did you?

A. No. I examined his back at that time and I found that he had a very tight and tense back and tender. I made a diagnosis at that time that he had a chronic lumbosacral myofasciitis or fasciitis. I don't remember exactly what the diagnosis was. I would have to refer to that transcript of record.

Q. Doctor, what recommendations did you make?

A. I recommended that he be given some stretchings and some exercises and these were given to him for a period of about one week, and he felt that he had learned how to treat [86] himself and he told the Chief in our stretching and exercise department that he was better. So he was allowed on his own and I had no further connection with his case until the other day.

Q. You examined him again, at my request, one day in the last week or so, did you?

A. I did on February 15th.

Q. Doctor, at that time you had X-rays taken, did you not?

A. I did.

Q. Have you those with you? A. I have.

Mr. Hon: Your Honor, may we have a shadowbox, please?

The Court: Do you need it?

Mr. Hon: If we don't have it here, I don't think we do.

Q. Do you have the X-rays? A. Yes, sir.

Q. How many X-rays were taken?

A. There are two X-rays here.

(Testimony of William R. Molony, Jr.)

Q. Just take one out at a time now.

The Court: Will you have them identified first?

Mr. Hon: Yes. Let me take this one. I will offer for identification, as Libelant's Exhibit 3, this X-ray, and the next one I will offer as Libelant's Exhibit 4 for identification. [87]

Q. Handing you Exhibit 3 for identification, I will ask you if that is one of the X-rays that was taken last week.

A. Yes; this is an X-ray of Mr. Richardson that was taken last week.

Q. Doctor, what portion of the body does that reflect?

A. This is a picture of the right femur.

Q. And from what view?

A. This is a lateral projection.

Q. The lateral view? A. Yes.

Q. Is there anything unusual about that particular X-ray, Doctor? What does it reflect? Just show it to the Judge. .

A. This is the lateral view and it shows a metal plate extending along the mid half of the femur, the right femur, and through the central area. At the plate there, there appears an old healed fracture. In this view, it is in relative coalignment. It has some increase in the cortical substance of the bone.

Q. Is there angulation shown in that picture?

A. Not in this view.

Q. Will you hand that to his Honor and let him inspect it, please? What was the date that was taken, Doctor? A. February 5, 1947. [88]

Mr. Hon: I offer that as Libelant's Exhibit No. 3.

The Court: It may be received.

(Testimony of William R. Molony, Jr.)

Q. By Mr. Hon: Now, I hand you Libelant's Exhibit No. 4 for identification and ask you if that portrays any portion of the femur of Richardson.

A. This —

Mr. McHose: May we see it, please?

Mr. Hon: I am sorry I didn't show it to counsel.

Q. Disregarding the last question, Doctor Molony, what view is this X-ray taken from?

A. This is what is known as the anterior-posterior projection of the right femur.

Q. Is that from the front to the back?

A. Yes; that means taken from front to back. Anterior means front and posterior back.

Q. And "lateral" meant sideways, didn't it?

A. Yes. Included, also, was a portion of the pelvis and the sacrum, which is incidental in the picture, I believe. This picture here shows the same plate and screws that I mentioned in the lateral view. There is a fracture, a healed fracture, well healed, through the mid portion of the femur, the plate bridging the fracture area. The plate is held by seven screws. There is no evidence of any pathological changes around the plate or the screws. In the area of the fracture site and on the medial surface of the femur, [89] an osteoma is formed.

Q. What is that osteoma?

A. Osteoma is an outgrowth of cortical bone.

Q. Just show his Honor what the osteoma is on that. You can mark that with an "X."

A. It is the outgrowth of bone which you see at this central area of the femur, which is called an osteoma.

(Testimony of William R. Molony, Jr.)

Q. Is that an increased bone formation?

A. It is an increase in the bone formation, just as the word says.

Q. How much increase is there there, Doctor?

A. This is approximately an area of one inch by, I would say, half an inch because there is some magnification there. This osteoma is in the direction of the eductor tendon and attaches to the bone in that area.

Q. What, if any, effect does that have on the patient?

A. As a result, it doesn't have any particular effect. I personally can't say too much about this because there hasn't been enough time elapse yet to say this is a result of his fracture.

Q. Where is it with reference to the fracture site?

A. It is at the area of the fracture site. I do not believe that it was a subperiosteal hematoma which had been calcified.

Q. Do you have a professional opinion as to the cause [90] of the osteoma?

A. I have no professional opinion of the cause of the osteoma because I have no previous X-rays to go by and can't say whether he had this before or it came as a result of the accident.

Q. You don't recall whether it was on the X-rays taken before?

A. No; I don't. I studied over the previous X-ray reports and I could find no mention of this growth, bony growth, in those reports.

Q. If there were no—or, if that didn't show in the original X-rays, would you have a professional opinion?

A. Well, yes; I would have an opinion then, if such were so. These particular growths usually take place

(Testimony of William R. Molony, Jr.)

in the plane of the third part of the tendon and eventually they become capped with cartilage and, if so, then their terminology is changed and, instead of an osteoma, it is called an osteochondroma. The osteochondroma then becomes covered with a bursa. A bursa is a proposition just like the alemite systems in automobiles. Occasionally this bursitis which results becomes the site of pain, and, if such occurs, then the growth must be removed surgically.

Q. Doctor, is any angulation shown in that picture?

A. Yes; he has a few degrees, not very many. He has, I would say, anywhere from three to four degrees of lateral [91] angulation at this point.

Q. At what point?

A. Starting at the site of his fracture and then a slight angle takes place in this one, this leg being in slight allocation in this picture.

Q. And what, in your opinion, is the cause of that angulation?

A. That is the way the bone grew together after the fracture.

Q. Does that have any effect on his walking or the position of his knees?

A. In this particular case, he has a slight — in my examination of this chap, I found that he had a slight varus of the right knee, which means a bow leg.

Q. And what is the cause of that?

A. Well, I think that is due to this fracture.

Q. The angulation?

A. I think that the varus that he has in the right knee and leg, compared to an examination of his left, is due to his fracture.

(Testimony of William R. Molony, Jr.)

Q. Did you examine his right foot?

A. Yes, sir; I examined his right foot.

Q. Was there anything unusual about his right foot?

A. The right foot turns inwards. The forefoot turns inwards and also his heel has a tendency towards turning in- [92] wards. Examining his walking, he walks on his right foot different from his left and he tends to put more of his weight on the outer side of his right foot than he does on his left foot. On examining his shoe, one can see where he wears out the outer side of his toe and heel much more so on the right than on the left.

Q. And what is your professional opinion, causing a toeing in of the right toe or heel?

A. I believe that is a result of his injury.

Q. Doctor, take the stand again, please, and let me have that X-ray, please.

Mr. Hon: I offer that Libellant's Exhibit No. 4 for identification as Libellant's Exhibit 4 in evidence.

The Court: It may be received.

Q. By Mr. Hon: Doctor, did you take any history of complaints from the man? A. I did.

Q. What complaints, if any, did he make?

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and wouldn't be the evidence of any fact.

Mr. Hon: Your Honor, the Doctor has to determine and take all of the facts from the patient in order to make his examination.

The Court: Isn't that shown on the report, the history of the case? [93]

(Testimony of William R. Molony, Jr.)

Mr. Gallagher: I think what Mr. Hon is asking now is what did the libelant tell the Doctor a few days ago when the Doctor examined him.

The Court: You want to introduce that for what purpose?

Mr. Hon: Your Honor, this Doctor had to have some basis for making the examination.

Mr. Gallagher: The rule in the federal court is different from the rules in the State court in that respect. That is one of the two things of which I am sure. The Circuit Court of Appeals has held definitely that history given to a doctor, who is employed not to treat a patient but merely to examine him, is not admissible in a personal injury case.

The Court: That it is not admissible for the purpose of arriving at any facts relative to the injury. But what about for the purpose of the conclusions of the doctor? Isn't he required to get the history?

Mr. Gallagher: If we want to ask him about the history, that is up to us, but, if they want to ask him about it, I don't think they can do that.

The Court: If you can ask him for an opinion in connection with the injury —

Mr. Hon: I was leading up to that.

The Court: — I don't see why he can't ask him what basis he took into consideration when he formed the opinion.

Mr. Hon: Let me get at it in another way, your Honor. [94]

Q. Did you take a history from the patient?

A. I did.

(Testimony of William R. Molony, Jr.)

Q. Doctor, based on your findings and your examination, can you give us a professional opinion as to whether or not this man is suffering from pain in his back?

A. Yes; it is my firm opinion that he is suffering with pain in his back. I base that also on a previous examination a long time back.

Q. And what about the leg there at the fracture site?

A. I can't particularly tell just how much pain he is having in his leg.

Q. Did he give you a history of pain?

A. He did.

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and is not competent evidence of any fact.

Mr. Hon: All parties are present in court, and he can examine Richardson and the Doctor. I think a doctor in arriving at a professional opinion has to take the patient's complaints into consideration.

The Court: You may ask him what the opinion was and you have a right to cross examine him upon what basis he formed that opinion or what facts he took into consideration.

Mr. Hon: Is the objection overruled, your Honor?

The Court: Overruled.

Q. By Mr. Hon: Answer the question, Doctor. [95]

A. I am getting a little behind here. What is the question?

Q. By Mr. Hon: Will you read the question, Mr. Reporter?

(The reporter read the following: "Q Doctor, did you take any history of complaints from the man?

("A. I did.

(Testimony of William R. Molony, Jr.)

("Q. What complaints, if any, did he make?")

Mr. Gallagher: May the record show the objection before the answer he gave? The witness answered simultaneously.

The Court: I think you should go a little farther than that, and find what history, before the Doctor can give his opinion.

Mr. Hon: Yes.

The Court: That objection may be sustained and you may ask another question.

Mr. McHose: May the answer be stricken out?

The Court: The answer may be stricken.

Mr. Hon: Maybe I didn't understand your Honor.

Q. What history did you take from the patient?

Mr. Gallagher: That is objected to upon the ground it calls for hearsay and wouldn't be substantive evidence of any fact in issue in this case.

Mr. Hon: I will get at it in this way. Doctor, based [96] upon your examination of this patient, in your professional opinion, does he or does he not have permanent disability?

A. Yes; he has, in my opinion, permanent disability.

Q. And can you give us your opinion as to what percentage it is?

A. In my opinion, he has 30 per cent permanent-partial disability.

Mr. Hon: You may take the witness.

(Testimony of William R. Molony, Jr.)

Cross Examination

Q. By Mr. McHose: Doctor, Molony, you testified that you examined Mr. Richardson, in Long Beach, on September 15, 1945. Was that an official examination while he was in the Long Beach Naval Hospital?

A. No; that is an official examination while he was attached to his unit.

Q. And he was no longer in the Naval Hospital at Long Beach at that time, is that it?

A. He had been returned to duty a few months before that.

Q. The reason I asked the question was because there was introduced a medical record of the Naval Hospital this morning, which carried down to some time in 1945, at which date he was transferred apparently to the Arrowhead Springs Hospital, and there is nothing in here that shows the examination you made. [97]

A. That is a transcript of the hospital chart herein.

Q. This is a transcript of the medical record?

A. What Mr. Hon has is his medical record.

(Inaudible conversation between counsel.)

The Court: Do you intend your conversation for the record?

Mr. Hon: No, your Honor. This is just trying to help counsel.

Mr. Gallagher: If your Honor is going to take a recess, this might be a good time to do it.

Mr. Hon: I would rather get through on account of the Doctor's time.

The Court: Yes; we will continue for the time being.

Q. By Mr. McHose: Dr. Molony, Mr. Hon has handed me a photostat of a medical history, which he

(Testimony of William R. Molony, Jr.)

indicates covers a report made by you. Do you recognize that report?

The Court: Did you have that document identified?

Mr. McHose: I didn't intend to put it in evidence, your Honor. I thought I would simply read from it into the record, if the Doctor identifies it.

Mr. Hon: I have no objection to the whole thing going in Mr. McHose.

Mr. McHose: I thing it might unduly complicate the record in view of the fact you have put the other document in. There are only about four or five lines that cover this exam- [98] ination.

Mr. Hon: Whatever you want.

Your Honor, so I can clear it up in your Honor's mind, this is a photostatic copy of the actual records at the Naval Hospital. This morning, when I had this certified copy from them, I was, frankly, under the impression that this contained everything that this has.

The Court: You mean that the exhibit now in evidence contained it?

Mr. Hon: Yes, sir; and apparently the exhibit I put in evidence only goes down to January 5, 1945. They have apparently omitted to put the rest in. I don't know why. But this is his complete medical record that takes it right on up to the time he got his medical discharge.

The Court: Why don't you introduce the whole thing?

Mr. Hon: I would be very glad to.

Mr. McHose: If the court please, I thing the Doctor here can identify the portion of the record he knows about himself and that is why I thought we could identify that, read it into the record, and then you will have a record that has been identified. We don't want to let you put in other photostats without some kind of identification.

(Testimony of William R. Molony, Jr.)

Mr. Hon: The only thing I could do would be to call the men back up here.

A. May I see the other one, Mr. Hon? [99]

Mr. Hon: This is more clear.

A. There is something cockeyed here.

Mr. Hon: I am going to have to straighten out another thing, Mr. McHose.

The Court: Let's take care of one thing at a time.

Mr. Hon: I have mislaid the court exhibit.

The Court: What is it you wish to do?

Mr. Hon: I shouldn't have said that that included this. This, your Honor, is the hospital record I introduced this morning. What the Doctor is looking at now is the medical record, which is separate and distinct from the hospital record. I have got the medical record from Washington, D. C., and I have a letter accompanying it from Washington, D. C. That is his complete record while he was in the hospital, which I would be glad to introduce with this letter, showing it came directly from the United States Coast Guard and signed by T. LeBlanc, Lieutenant Commander, U. S. Coast Guard.

The Court: You might submit it to counsel.

Mr. Hon. I had no way of subpoenaing it because that is in Washington, D. C., as I understand.

Q. By Mr. McHose: Dr. Molony, you have now examined the photostat which Mr. Hon has shown us and, as I understand it, this is a report which followed the examination you made of Richardson, which you said was on the 15th of September, [100] 1944, but which you now wish to correct to September 15, 1945?

A. That is right.

(Testimony of William R. Molony, Jr.)

Q. And this report simply shows the following: 1½ inch atrophy of the right thigh. That is what you testified to, isn't it? A. Yes, sir.

Q. Scoliosis fascial tightness throughout?

A. That means the lumbo sacral back.

Q. There was a tightness of the back muscles, is that what you mean? A. Yes, sir.

The Court: I don't think we are getting this record in very good shape. If you have a page that you desire to extract from that record, or whatever you wish in evidence, we ought to have that in the record so we know what your questions are directed to, so far as this record is concerned.

Mr. Hon: I have no objection to removing that page and putting that in.

Mr. McHose: I don't want to put in portions of the record that haven't been identified.

The Court: There was submitted a letter a moment ago. You might examine that and see if you are willing to consider admitting the entire transcript.

Mr. McHose: We don't want to be difficult about it. [101] It may go in. But I still want to read to your Honor what the page here says. I goes on to say, "Impression: Weak muscles in right leg and limp have combined to produce abnormal strain, leading to fascial tenseness. R." — does that mean Recommendations?

A. Yes.

Mr. McHose: "Stretchings and exercises."

Q. And you recommended that that is what should be done to correct this condition, is that it, Doctor?

A. That is my recommendation for his back pain at the time.

(Testimony of William R. Molony, Jr.)

Q. But you don't know what did actually occur in the way of giving that treatment after that time, do you?

A. No. That was out of my hands after that.

Mr. McHose: Do you wish to introduce this?

Mr. Hon: Yes; I would like very much to.

Mr. McHose: As Libelant's Exhibit 5?

Mr. Hon: Exhibit 5. And I will introduce the letter with it. Will you attach this as part of the exhibit?

The Court: Is there any objection?

Mr. Gallagher: No; we make no objection.

The Court: You read from what page of that exhibit?

Mr. McHose: We read from a page which is not numbered and which is the third from the last.

The Clerk: They are numbered in the upper right-hand [102] corner.

Mr. McHose: Page 16, I guess it is.

The Court: It may be received as Libelant's Exhibit 5.

Q. By Mr. McHose: Doctor, so far as the leg is concerned, would you say that there is a good recovery from this accident, from the fracture of the leg?

A. There was a good healing of the bone.

Mr. McHose: I think that is all.

Mr. Gallagher: No questions.

Mr. Hon: May this witness be excused, your Honor?

The Court: Yes.

A. Is that all?

The Court: That is all, Doctor. Thank you.

Mr. Hon: Are you going to take a recess, your Honor?

The Court: We will take a recess for 15 minutes.

(Short recess.)

The Court: You may proceed.

Mr. Hon: Mr. Richardson, take the stand again.

DAVID LAWTON RICHARDSON

the libelant, recalled, was examined and testified further as follows:

Direct Examination (Resumed)

Mr. Hon: Mr. Reporter, would there be any way you could find the last two answers, about a quarter of 12:00, before I started on the medical?

Mr. McHose: You were talking about the blueprint. [103]

Mr. Hon: Oh, I believe the court asked us to use a blueprint.

Q. Mr. Richardson, do you understand this center blueprint?

Mr. McHose, this being your blueprint, am I correct in saying that the bottom part is starboard?

Mr. McHose: Well, obviously, in that diagram that is the rear, end side or the starboard side of the ship.

Mr. Hon: And the left of the map is the aft end, is that right?

Mr. McHose: It is the stern.

Mr. Hon: And this center of the blueprint is a bird's eye view of the ship, is it?

Mr. McHose: I believe the center is the main deck plan.

Mr. Hon: Do any of you men know?

Mr. McHose: I have no marine architects here. It is obvious that the outline in the center of the blueprint is the main deck.

The Court: Have you any photographs that might simplify the illustration here?

(Testimony of David L. Richardson)

Mr. Gallagher: We have no photographs of this passageway and whatever he wants to ask him about now. We have some photographs of the part of the ship where the accident happened.

Mr. McHose: I would be willing to stipulate that the [104] center diagram is the plan of the main deck of the ship, on which this accident occurred.

Mr. Hon: If it is your understanding, it is sufficient, Mr. McHose.

Mr. McHose: Yes; that is my understanding.

Mr. Hon: And yours, Mr. Gallagher?

Mr. Gallagher: Yes.

Mr. Hon: And, Mr. McHose, it is your understanding that the covered passageway at the aft starts on the starboard side at this point and leads around to the port side?

Mr. McHose: I don't know just how it leads around but I do understand that the passageway, which goes alongside the various rooms in which the ship's personnel lives, is this passageway which is indicated here; and some place in the after end I think there is an opening where you can cross over to the other side and come down the port passageway, which is a similar passageway, to which the various rooms open.

Mr. Gallagher: There is only one correction that should be made. The quarters along the starboard passageway are the quarters of some enlistment personnel; also, the quarters of any officers that are in the engine department or the deck department.

Mr. McHose: On the same side, on the port side, apparently. [105]

The Court: What are we trying to arrive at?

(Testimony of David L. Richardson)

Mr. Hon: My only purpose in *bring* that out was to show the course he took.

The Court: If you are going to do that, get a red pencil and illustrate the steps he took from his boarding the vessel until the time of the accident.

Mr. Hon: I am not introducing this, your Honor. I think he can just say, your Honor, without any trouble, the course he took.

The Court: He can show it to me but what will you have in the record?

Mr. Hon: I think I can sufficiently describe it for the record.

Mr. Gallagher: I think your Honor's suggestion is the only sensible one. Let him take a red pencil and outline his course on there.

Mr. Hon: That is all right. The only trouble is I haven't a red pencil.

The Court: Which would make the best impression?

Mr. Hon: White would be much better in color than this.

Q. Now, take that blue pencil, and, this being the starboard side of the ship, — do you understand this map? A. Yes, sir.

Q. And, this being aft, show approximately where you boarded the ship. Put an "X" approximately where you stepped [106] on the ship from the gangplank.

The Court: Mark it "X-1."

Q. By Mr. Hon: Yes; mark it "X-1." Mark it heavy. Mark it real heavy, with an "X" and bigger than that. All right. Now show the course you took in getting

(Testimony of David L. Richardson)

to the covered passageway that you state you entered from the starboard side. Just draw a line leading to it.

A. May I say something?

Q. If it is to clear up anything, yes.

A. Just the exact number of feet from this gangplank to the open passageway I do not know.

Q. No; you are not being tied to the exact footage. Just give generally the course you took.

The Court: He can draw that line in the direction in which he walked.

The Clerk: He will have to have a backing on part of the map, your Honor.

The Court: If you want to, you can spread the map out on the table and make your lines and then we can look at it. I think ink will show better than a pencil.

Mr. McHose: Yes; that is better.

The Court: Would you rather have ink to show up better?

Mr. Gallagher: I tried it, your Honor. Get the red pencil and see if it makes a better mark.

Mr. McHose: Don't you think that is better? (Drawing [107] on map.)

Mr. Gallagher: Yes.

A. I don't remember just how this circle went in here.

Mr. Gallagher: This is an open space here.

A. That is the place I went and I did turn and came over to this passage. I guess that would be the door here some place.

Mr. Gallagher: There is no door there.

A. I come over there some way; I don't remember how. I know I made a circle.

(Testimony of David L. Richardson)

Mr. McHose: It is my understanding this is open here; that there is a hatch there but that this is open there.

Mr. Gallagher: Yes; you can walk on the hatch cover.

A. Does it show a hatch there?

Mr. Gallagher: Yes; right there.

A. Right there is where I come out at.

Mr. Gallagher: All right. Just draw up to where you ended.

Mr. McHose: You are indicating that black hatch door at the end of the passageway? A. Yes.

The Court: Mark that "X-2," the point of exit.

Mr. McHose From the port side.

The Court: From the port side. Since you have used a blue pencil, suppose you trace that also and that will make [108] the line more distinct. And you might show, with an arrow, the direction in which you were going as you follow around the course there.

Q. By Mr. McHose: You are indicating you went through the opening at the end of the port passageway and turned to the right, and this little object here, which is shown to be a space 4 feet by 6 feet, is the hatch down which you fell? A. Yes, sir.

The Court: You might mark this hatch with an "X" clear through there.

Mr. McHose: "X-3," your Honor?

The Court: "X-3."

Q. By Mr. Hon: David, you have now drawn a blue and a red line from "X-1," leading around the aft of the ship up to a point marked "X-2"?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. Now, does that represent the course you took after you got onto the ship? A. Yes, sir.

Q. Was there a door or anything taking the place of a door on the starboard side when you entered that passageway? A. A canvas flap.

Q. At that time, then, you shoved the flap back and went right into the passageway?

A. Yes, sir. [109]

Q. Was that passageway lighted? A. Yes, sir.

Q. What was your purpose in going into that passageway?

The Court: Which passageway is that?

Mr. Hon: The only passageway we have referred to, to the aft of the ship. The only one I will refer to will be this passageway starting at the entrance on the starboard side, making the horseshoe turn around to "X-2."

Q. By the way, it might be well for you to mark "X-4" on what represents the entrance into the passageway on the starboard side. Will you mark this "X-4" right at the entrance where you entered, to represent the entrance to the passageway when you first entered it?

A. Yes.

Mr. Gallagher: You might be able to make that a little clearer to his Honor if it is not clear already. This thing we have been referring to as the passageway on the starboard side and the passageway on the port side is nothing more than a hallway, as we talk about it on land.

The Court: I think you described it in your statement earlier; sort of a catwalk.

Mr. Gallagher: No, your Honor; it is not a catwalk at all. The catwalk is out here on the open deck. You

(Testimony of David L. Richardson)

see, this is a covered hallway like you would find in a building.

Mr. Hon: Add rooms on each side. [110]

The Court: I understand.

Mr. McHose: To make it a little more clear, your Honor, when he boarded the ship here, he was on the main deck. This is entirely open and the catwalk is on the deck above, running along the top of this deck. And he walked on the open deck along here until he came to the door going into the passageway, and then he was in an enclosed space, with a ceiling over his head, representing the deck above, but that decking extended out to the end of what they called the after house, which is right here near this point.

Mr. Hon: You have got written here, "Officers' Mess." This is where the officers' mess was on the ship, is that right?

Mr. McHose: I assume so; yes.

Mr. Hon: And this is the petty officers' mess across the passageway?

Mr. McHose: I assume so.

Mr. Hon: And these rooms are all as represented here, is that true?

Mr. McHose: I don't thing that is material.

Mr. Hon: But that is the condition the way the ship was built?

Mr. McHose: I think so.

Mr. Hon: And, as far as you know, it was that way on the night of the accident? [111]

Mr. McHose: Yes.

Q. By Mr. Hon: What was your purpose of walking from "X-1" over to "X-4" and going through this lighted

(Testimony of David L. Richardson)

passageway over to "X-2"? What was your purpose in going in there?

A. To make a general inspection.

Q. To make a general inspection? A. Yes, sir.

Q. When you come to "X-2," that is the exit from the port side of this passageway? A. Yes, sir.

Q. This is "X-2" right where I am pointing?

A. Yes, sir.

Q. When you got to "X-2," did you find a door leading out onto the main deck? A. A canvas flap.

Q. There is a canvas flap, is that right?

A. Yes, sir.

Q. How did you get out onto the main deck?

A. I pushed the canvas flap back.

Q. You pushed it back? A. Yes, sir.

Q. And then stepped out? A. Yes, sir.

Q. What was the condition of the main deck with regard to light or dark when you stepped out from the passageway? [112] A. It was dark.

Q. It was dark? A. Yes, sir.

Q. Was there a coaming or a raised threshold that you had to step over in getting out of the passageway from the port side? A. Yes, sir.

Q. About how high was that coaming?

The Court: What is it, now, that you are referring to?

Mr. Hon: I asked him, your Honor, when he stepped out onto the main deck, if he had to step over a coaming or the threshold through that doorway.

Mr. Gallagher: We don't have to guess about that. We have shown proctors for the libellant photographs and the photographs show how high it was.

(Testimony of David L. Richardson)

(Inaudible conversation between counsel.)

Mr. Hon: Your Honor, I think, to be a little informal, we can show you that from the photographs.

The Court: If I understand, a coaming is the sort of solid threshold that he stepped over.

Mr. Gallagher: No; it isn't exactly that.

The Court: If you want to introduce these photographs, you may introduce them later.

Mr. McHose: We might as well introduce them now. This could be marked as a libelant's exhibit. [113]

Mr. Hon: Not libelant's; no. Respondents' Exhibit A will be all right. Shall we identify our exhibits separately?

Mr. Gallagher: I don't thing it is necessary. So far as the photographs are concerned, let's introduce them as joint exhibits.

Mr. McHose: We will offer them in evidence.

The Court: Is there any objection?

Mr. Hon: No objection.

Mr. McHose: They are photographs which were taken some time after the accident happened but show the general condition.

Mr. Hon: It is not supposed to truly represent the condition at the time of the accident, is it?

Mr. Gallagher: It is supposed to truly represent all of the substantial objects shown in the photograph. Otherwise, there have been no changes structurally, pipes and things like that.

Mr. Hon: Structurally but any loose objects and the like were not necessarily there at the time and you wouldn't know?

Mr. Gallagher: No; I wouldn't know.

(Testimony of David L. Richardson)

The Court: It may be received as Respondents' Exhibit A and the second one may be received as Exhibit B.

Mr. Gallagher: It is a photograph which shows the hatch and other substantial particulars of the ship's structure [114] looking from the port to the starboard side of the vessel.

Mr. McHose: I was going to take each of them and explain them to your Honor.

The Court: Very well.

Mr. McHose: The first one, which we have marked as Exhibit A, is a view taken from this position over here, looking from this bulkhead. When we speak of the bulkhead, that means this: it is a wall of the ship going across the ship. In other words, this is a solid structure here all the way across the ship and there is a door here and a door here. Photograph A shows that door closed. Obviously, that is an outer surface of the ship and must be solid against the waves, so that bulkhead can be closed and made very fast, like a solid part of the ship. But on the evening of the accident, according to the testimony of Mr. Richardson, that door was open and that canvas curtain was hanging across there, probably to keep the light out. That Figure A, your Honor, shows this portion of the ship looking at it like that. It shows the hatch, the bunker hatch, which is this little space here, four feet wide by six feet long, according to the blueprints, and it has these bolts to fasten it down tightly. And in this picture the cover is closed. The picture also shows a valve here. This wheel is to a valve leading to one of the oil lines that runs across the ship up here above our other lines, and this [115] structure which you can see here, with the iron chain across, is the beginning of the catwalk.

(Testimony of David L. Richardson)

In other words, the catwalk starts at the deck above here and goes out all along the reach of the ship up to the forward house, so that you can walk along, if you go up to this part of the deck, along that catwalk, all the way forward, without crossing the main deck of the ship.

The photograph Exhibit B is a photograph which was taken looking this way, looking from the port to the starboard side of the ship, and it shows the same bunker hatch but with the hatch cover opened. And the court can see that the hatch cover opens on hinges and leans back, when it is opened, against the forward end of the bulkhead wall.

This picture here was taken some time later when there was a lot of other material on the deck of the ship, and these lines across here are air hoses or electrical conduits of some kind. We know nothing about what may have been on the deck on the night that the accident happened.

Exhibit C is another view which is looking from the door, and in that picture the door is opened and is leaning back here against the bulkhead wall. And this picture shows quite clearly the height of the coaming. The coaming referred to is the space between the main deck and the lower sill of the door, which is quite high. And this one also shows the hatch cover opened and one of the ship's pipes in front of the hatch [116] opening. These air hoses, or electrical conduits, whatever they may be, were also there at the time this picture was taken but we don't know whether anything of that sort was there the night of the accident. We don't claim that as the condition then.

Mr. Hon. That is a very important point. And, in observing Exhibit C, I have no objection to its introduction but these are air hoses that have no place in the pic-

(Testimony of David L. Richardson)

ture because this picture was taken, according to this, on 3-8-46, and the only purpose of putting this picture in is to show the open hatch and the lid to it leaning back against the bulkhead. This is the door itself leaning back against the bulkhead. But those rods have nothing to do with this accident. We say we were not there at that particular time they were opened.

Mr. McHose: We don't know what was there. The ship was undergoing repair and there may have been a great many other air hoses here.

The Court: To what do you refer as the coaming?

Mr. Hon: This part right here. Here is a coaming here.

The Court: That is the material right in the door?

Mr. Hon: Yes, your Honor. You have to step over it.

Mr. McHose: If you look at Exhibit A, the bulkhead door in the ship is kept up above the level of the deck so, when the ship is rolling, water won't be coming into it. They are [117] cut out of the solid steel, maybe a foot above the deck. A coaming, in reality, is this space on a hatch.

The Court: It is a belt around the hatch?

Mr. McHose: Yes. Whether that is properly called a coaming, I am not sure, but it is the door sill over which you have to step to go in or out.

The Court: Call it a threshold, if you like.

Mr. Hon: Yes.

The Court: All three exhibits may be admitted in evidence.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Now, David, what was your purpose in stepping from the lighted passageway onto the main deck?

A. For general inspection of the main deck.

Q. How many steps did you take, before the accident, after you stepped from that doorway?

A. A step and a half or maybe two steps.

Q. One foot went over the coaming of the —

Mr. McHose: I suggest that you don't lead him.

Q. By Mr. Hon: Just tell us what your actions were from the time you started to take your first step to get out onto the main deck, until the accident happened.

A. I walked up and pushed that canvas flap back and I looked out and set my left foot outside of the door and, as I brought my right one out, I turned, as it was necessary for it to go down on the deck, and I fell in the hold. [118]

Q. Then, I take it, after you got your left foot over the coaming, you took one step and went right down the hatch? A. Yes, sir.

Q. Were there any lights at or near that open hatchway? A. No, sir.

Q. Were you able to see that open hatchway by looking down? A. No, sir.

Q. Was there any guard or railing around that?

A. No, sir.

Mr. McHose: Just a moment. I object to that last question and move that the answer be stricken on the ground he has already testified he couldn't see anything, and, unless he saw that there was not any guard there, I think the answer should go out,

(Testimony of David L. Richardson)

Mr. Gallagher: I join in the motion.

The Court: That may be stricken. When you put your left foot out, it would rest on the deck or solid ground or something?

A. Yes, sir; when I put my left one out.

The Court: That is, you stepped over this coaming or threshold, or whatever we call it, and your left foot then rested on solid ground, did it? A. Yes, sir.

Q. And then you stepped with your right, is that right? [119] A. Yes, sir.

Q. You stepped over the same place there?

A. Yes, sir.

Q. And then is when you fell, is that correct?

A. Yes, sir.

Mr. McHose: When you say "solid ground," you mean the deck, don't you?

The Court: I should have said the deck.

Mr. Hon: Your Honor means the foundation under his foot.

Mr. McHose: It is a steel deck.

The Court: I understand that.

Mr. Gallagher: And your Honor asked him whether he put his right foot down as he came over or whether he stepped sidewise like that? I didn't quite understand.

The Court: You may tell just how you stepped over.

Mr. Hon: Yes; the directions.

A. When I set my left foot down, I turned to the right.

The Court: You turned to the right?

A. Yes, sir.

The Court: With your left foot on the deck?

A. Yes, sir; and, as I turned to put my right one down, I fell in the hold.

(Testimony of David L. Richardson)

Q. By Mr. Hon: Did your foot come in contact with any object prior to your falling into the hold, your right foot? [120] A. No, sir.

Q. And how far did you fall, David?

A. Approximately 37 foot.

Q. What position were you in when you came to a rest? A. A sitting position.

Q. A sitting position? A. Yes, sir.

The Court: I think you have covered that already.

Mr. Hon: I believe I did; yes.

Q. And what was your purpose in turning to the right as you came out of the door?

A. To inspect for fire extinguishers and fire hose.

Q. And where did you expect to find those, Mr. Richardson?

Mr. Gallagher: That is objected to upon the ground it is immaterial unless there were some there.

Q. By Mr. Hon: Then, your purpose in making the right turn was to inspect the ship for fire extinguishers at that time, is that right? A. Yes, sir.

Q. Up to that point had you seen or found anybody on the ship? A. No, sir.

Q. Or any officer? A. No, sir. [121]

Q. Mr. Richardson, among other things, was it your purpose before leaving the ship to contact the officer-in-charge? A. Yes, sir.

Q. And that was a part of your duty at the time?

A. Some time when I was on there, I was to take a report from the officer on duty.

Q. Take a report from the officer on duty?

A. Yes, sir.

Q. And up to the time of the accident that officer had not been seen by you? A. No, sir.

(Testimony of David L. Richardson)

Q. Was there any regular prescribed route that you had to take in making your inspection?

A. No, sir.

Q. And what part of the ship were you inspecting or to inspect? A. All the ship.

Q. The entire ship? A. Yes, sir.

Mr. Gallagher: Your Honor, during the lull, I want the record to show this. I made a positive statement this morning and I am not sure whether it is correct or not. I don't know for sure about the guard who was at the bottom of the gangway or the gangplank, and I will find out before the case is over. [122]

The Court: Do you mean the guard that ushered the libelant on board?

Mr. Gallagher: There were two guards, as I understood it. One was out at the Bethlehem Company gate. Then there was another man he described as a guard down at the foot of the gangway, on the dock, and it is that man that I am not certain about, the one down at the gangway, on the dock, just before he went aboard the ship.

The Court: Is there anything further?

Mr. Hon: There is one thing I was looking for, your Honor. I could probably get permission to ask it later. So at this time I will submit the witness for cross examination. May I ask what time you adjourn, your Honor?

The Court: I think about 4:30.

(Testimony of David L. Richardson)

Cross Examination

Q. By Mr. McHose: Mr. Richardson, I understand that you came out here six months or so before this accident happened. Is that about right?

A. It wasn't six months. It was from four to five months.

Q. Do you remember when you first went on duty down at Terminal Island?

A. On the 10th of February; somewhere in that neighborhood.

Q. February 10, 1944? [123] A. Yes, sir.

Q. And the accident happened August 6, 1944?

A. Yes, sir.

Q. Now, during that period of time my understanding is that your duties called for you to go aboard and inspect ships? A. Yes, sir.

Q. And you were down along the waterfront there from the time you began your duties here until this accident happened? A. Yes, sir.

Q. During that time you boarded a considerable number of ships, did you not? A. Quite a few; yes, sir.

Q. And did you make inspections similar to the inspection you intended to make on this ship the night of the accident? A. Yes, sir.

Q. And did you also perform other duties besides the duty of inspection on board the ships? A. Yes, sir.

Q. And did you board different types of ships?

A. Yes, sir.

Q. By that I mean freighters and Navy vessels and tankers. [124]

A. I didn't board Navy vessels. I boarded —

(Testimony of David L. Richardson)

Q. Commercial vessels?

A. Commercial vessels.

Q. And had you boarded vessels at the Bethlehem shipyard on previous occasions? A. Yes, sir.

Q. You had, then, gone on board vessels which were undergoing repairs? A. Yes, sir.

Q. You knew, did you not, that this vessel, the Frank Drum, was in the Bethlehem yard undergoing repairs the night you boarded her? A. Yes, sir.

Q. You had, as I understand you, been on board other tankers on previous occasions?

A. That is right.

Q. And you are generally familiar, are you not, with the deck arrangement of a tanker?

A. Fairly well.

Q. You know what we mean when we refer to the catwalk, do you? A. Yes, sir.

Q. Will you explain to the court what the catwalk is?

A. It is an upper walkway. It is a walkway about six feet above the main deck, or more or less that number of feet. [125]

Q. What is the purpose of the catwalk? Do you know? A. To walk over.

Q. To enable people to get from the after part of the ship up to the forward end of the ship, without going along the main deck, is that correct?

A. That is correct.

Q. And that catwalk has chains or ropes along the side of it, so you can walk along safely in it, is that correct? A. That is correct.

Q. On the deck of a tanker, Mr. Richardson, there are a great many pipelines, is that true?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. And those pipes are large pipes that are used in pumping oil and other commodities from one tank to the other of a tanker, is that true? A. Yes, sir.

Q. So that they may be as large as eight or 10 inches in diameter, is that correct?

A. They are all different sizes, some small and some larger.

Q. They are various sizes and they get to be fairly good sized, do they not? A. Yes, sir.

Q. Did you happen to look at the pictures which were [126] introduced in evidence here a little while ago? I show you Respondent's Exhibit A and ask you if you recognize that as the deck of a tanker, without confining you to identifying it as the Frank G. Drum. You can look at that picture and tell us if it is the deck of a tanker, can you not? A. Yes.

Q. And that is like the deck of a good many tankers that you boarded when you were making an inspection?

A. Something similar to it.

Q. And the pipes that are shown here are similar to the pipes that are commonly on the decks of tankers, is that true? A. That is true.

Q. I show you an object here in the center of this picture, with a wheel on it. Do you know what that is?

A. That is a valve.

Q. That is a valve that is used to regulate the flow in the particular pipe to which it is attached, is that right? A. I guess so.

Q. And you would turn the valve to shut off the pipe or you open it to let whatever it is run through the pipe, is that correct? A. That is correct.

(Testimony of David L. Richardson)

Q. And you recognize this object that is beside [127] the valve, do you? What is that?

A. That is the hatch.

Q. That is a hatch, a means of getting down into the compartment that is below the deck, is it not?

A. Yes, sir.

Q. And you have seen these hatches on many vessels that you have boarded, isn't that true?

A. That is true but maybe not in that particular place.

Q. In various places on the decks of ships?

A. Yes, sir.

Q. And, when I show you the blueprint of the ship here and point out to you various places where there are hatches, will you agree with me that all of these little objects that are marked as hatches are hatches on the deck of that ship?

Mr. Hon: Just a minute, your Honor. I submit that the question is not fair. There must be some showing that this witness has knowledge of the ship.

Mr. McHose: I will reframe the question.

Q. You do know, do you not, Mr. Richardson, that there is a hatch leading to every compartment in the ship, in a tanker, is that right?

A. No; I didn't know that.

Q. Well, you do know, do you not, that in a tanker there are a great many different compartments? [128]

A. Yes; I know that.

Q. In which commodities are carried?

A. Yes, sir.

Q. And you do not know that there is a hatch to every compartment but you do know there is a hatch to a good many compartments? A. A good many.

(Testimony of David L. Richardson)

Q. Have you during the time you have been aboard ships seen those hatches closed like this in this photograph? A. Yes, sir.

Q. And you have also seen them opened, have you not? A. Not without being lined off, roped off.

Q. That isn't responsive. My question was you have seen them opened? A. Yes, sir.

Q. I don't think I asked you whether you had been on the Frank Drum before the night this accident happened. Did I? A. No, sir; you didn't ask me that.

Q. Had you been on that vessel before?

A. Not that I recall.

Q. You might have been on it at some time when you inspected a vessel but you are not sure, is that it?

A. Yes, sir; that is it.

Q. You didn't always keep a record of the many vessels [129] that you boarded and you might have been on this one some other time?

A. I could have been on it some other time but I don't believe so.

Q. When you went on board these ships, Mr. Richardson, I would like to know a little more about what you did, what your duties were, when you say you went on board to make an inspection, to find out where all the fire extinguishers were, to see that they were in place, and to find the fire hose. Let's take one point at a time. You say, first, that you wanted to find out where all of the fire extinguishers were. How would you find that out?

A. I didn't know exactly where all of them were supposed to be but I was supposed to look for them and to see whether they were all proper or not.

(Testimony of David L. Richardson)

Q. Were there supposed to be a certain number of fire extinguishers on board a ship? A. No, sir.

Q. You didn't count the number of fire extinguishers on board? A. No.

Q. What do you mean when you say fire extinguisher? What kind of a fire extinguisher?

A. There are several different kinds; ones you can use just by hand, carying them around, and then there is some [130] that stand erect, big ones.

Q. Speaking, first, of those you use by hand, do you mean they are just lying around the ship and you pick them up off of the deck?

A. No, sir; they are hung up on the bulkhead.

Q. And they are various sizes? Is that what you have said? A. Yes, sir.

Q. Now, when you say you go on board to find out where they are, if you find out where they are, what do you do about it then?

A. That is all I do; just find out if they are there.

Q. How do you determine whether there are enough there or not?

A. Well, if there is a large place on the ship and there wasn't, say all through one of those passageways there wasn't any fire extinguishers or along that bulkhead on the outside or along that catwalk, I would know there was something wrong.

Q. And what would you do if you found that to be the case?

A. I would get hold of the man and tell him about it and see if he couldn't get some put there.

(Testimony of David L. Richardson)

Q. Was it left discretionary to you to determine whether there were enough fire extinguishers on board? [131]

A. No; not all of it to me; no.

Q. If you thought there ought to be more than you found, then what would you do about it?

A. I would ask the man to put more out.

Q. And, if the man said he hadn't any more or wouldn't put any more out, what would you do?

A. I would report it to the O. D.

Q. But the man you would report it to and discuss this situation with would be the mate of the ship?

A. Yes, sir.

Q. Do you recall finding any fire extinguishers when you walked through the passageway?

A. No; I don't recall.

Q. Where did you expect to find fire extinguishers out on the deck of the ship?

A. Along that bulkhead and up by the side of the catwalk.

Q. Referring, again, to Respondents' Exhibit A, I will ask you to assume for the moment that that is the bulkhead, the forward end of the bulkhead, on the after house here, on the Frank G. Drum. Do you see any fire extinguishers on that photograph or any place where fire extinguishers might have been kept?

A. I don't see none.

(Testimony of David L. Richardson)

Q. Have you ever, Mr. Richardson, on a tanker found [132] fire extinguishers along the bulkhead in a place such as this? A. Yes.

Q. You have? A. Yes; I have.

Q. Can you name any vessels on which you found fire extinguishers in that position?

A. No; I don't recall any ships' names.

Q. You spoke about fire extinguishers on the catwalk. Where would they be maintained on the catwalk?

A. Fastened to that end rail.

Q. Along the rail?

A. Yes; just as you come out of the bulkhead, on the inside of the house up there. When you come out on that catwalk, there should be a fire extinguisher sitting there.

Q. In order to get up to the catwalk, it would be necessary for you to go up to the deck above the one you were on, isn't that true? A. That is true.

Q. And, looking at the blueprint here, I show you some stairs. As you went along that passageway, did you see the stairs leading up to the other deck?

A. I don't remember.

Q. Well, you know, if those stairs are properly shown on this blueprint, that the way you would get up to the other [133] deck or the upper deck would be to go up the stairs? A. Yes, sir.

Q. And the only way to get on the catwalk would be to enter it from the deck above? I don't want to confuse you. I am simply trying to bring out the fact

(Testimony of David L. Richardson)

that, to get onto the catwalk, you had to go up the stairs or in some way get on the deck above where you were, isn't that true?

A. I don't know about that particular ship. I just went that short route but it seems like on other ships I have been on there were other ways to get on the catwalk; maybe steps.

Q. Yes; there might be some steps along the catwalk or some way of getting up to it from the main deck. But the ordinary way to enter the catwalk is the deck above the deck where you were?

A. Yes; that is right.

Q. And those fire extinguishers that were along the catwalk would be on the deck above where you were?

A. That is right.

Mr. Gallagher: Does your Honor adjourn at 4:30?

The Court: I think we will take a recess until tomorrow morning. Do you want to begin at 9:30 or 10:00?

Mr. Gallagher: I would prefer 10:00.

The Court: Very well; 10:00 o'clock.

Mr. Gallagher: Your Honor, may we have the witnesses in- [134] structed to return?

The Court: Yes. All witnesses are instructed to return and be here tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:30 o'clock p. m., an adjournment was taken until 10:00 o'clock a. m., Wednesday, February 12, 1947.) [135]

Los Angeles, California, February 12, 1947, 10.00 o'clock a. m.

(Same appearances.)

The Court: You may proceed.

DAVID LAWTON RICHARDSON.

the libellant, being previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Resumed)

Mr. Hon: May I inquire, first, what scale is the map drawn to, Mr. McHose?

Mr. McHose: I don't know. Well, it shows the scale as $\frac{1}{8}$ of an inch equals one foot, according to the map.

Mr. Hon: Do you know what the tonnage of the boat was?

Mr. Gallagher: I don't know.

Mr. McHose: I would like to stipulate, if you will, that it was over 3,000 tons.

Mr. Hon: I don't know. I have no knowledge of it. If you say it was, all right.

Mr. McHose: I would imagine it was about 16,000 tons.

Mr. Hon: All right.

Q. By Mr. McHose: You were talking about fire extinguishers yesterday, Mr. Richardson. When you walked through the passageway of the vessel, did you inspect fire extinguishers there?

A. I don't remember whether I saw any fire extinguishers [136] there or not.

Q. Isn't it customary to have fire extinguishers in the passageway of a vessel such as this?

A. Yes.

(Testimony of David L. Richardson)

Q. And, if there were extinguishers there, I suppose you inspected them, did you?

A. I saw them if they were there.

Q. You don't remember now? A. No, sir.

Q. Did you see any hose in the passageway?

A. I don't remember.

Q. Were you intending to inspect other vessels in the Bethlehem yard on the night of the accident?

A. Yes, sir.

Q. How many others?

A. All that were in there. I don't remember how many there were in the Bethlehem yard.

Q. Had your instructions told you to board other vessels as well as this particular vessel?

A. Yes, sir.

Q. And this happened to be the first one you went aboard after you went into the yard?

A. Yes, sir.

Q. Where did you intend to go after you went out the opening onto the deck? Did you have your mind made up as to [137] where you were going to proceed?

A. No; no definite place; just maybe to the bow of the ship and back over to the gangplank.

Q. Did you intend to contact the officer-in-charge of the ship? A. Before I left the ship; yes, sir.

Q. Up to that point, had you made any effort to find him?

A. When I was walking through the passageway, I was looking for fire extinguishers and, if I had run across the mate, I would have got a report from him then.

(Testimony of David L. Richardson)

The Court: What was that answer?

A. When I was going through the passageway, if I had run across the mate, I would have gotten a report from him at that time, any time when I was on the ship, I could have taken his report.

Q. By Mr. McHose: Explain to the court what that report is.

A. Just asking him if the ship was in good shape, how many of the crew there were aboard, and what his rating or rank was.

Q. Did you get those reports in writing or make them in writing?

A. We carried a little slip of paper around with us and we wrote all that down. [138]

Q. And would you have the mate sign it?

A. No, sir.

Q. Did you put it in any particular written form when you reported it to your officer?

A. It was wrote down each night, the number or the type of fire extinguishers and such as that, and it was handed by me to the O. D. at the barracks.

Q. You signed it and turned it in?

A. Yes, sir.

Q. When would you do that?

A. When I went off duty at 12:00 p. m. that night.

Q. When you made these inspections, did you go below decks on the ship?

A. Yes, sir; we went down to the engine room.

Q. Did you intend to do that on this ship?

A. Yes, sir.

Q. When were you going to do that?

A. Any time when I was on it, before I left.

(Testimony of David L. Richardson)

Q. You had no prescribed or set method of going through the ship, then? You could go any place any time you wanted to? A. That is right.

Q. It was left up to your judgment as to how you would make the inspection, is that it?

A. Yes, sir. [139]

Q. You didn't talk to anyone on board the ship before the accident happened, is that correct?

A. No, sir.

Q. You didn't ask anybody to turn on any lights for you before you went on the deck?

A. I didn't see anybody to tell.

Q. You did testify, though, on direct examination, that, when you came up to that canvas and pushed it aside, it was dark at any place where you went?

A. When I pushed the canvas back, the light showed just outside the door, that is, the space where I set my left foot down, and the rest of it was dark.

Q. But the deck itself was dark when you went on it? A. Yes, sir.

Q. The only place you could see was the place where you put your first step? A. Yes, sir.

Q. After you left the hospital, Mr. Richardson, I understand you went back to your home in Florida?

A. Yes, sir.

Q. And, after you had your leave, you came back in 1945 and then you went back to your farm and you have been there ever since, is that correct?

A. That is correct.

Q. How large is your farm? [140]

A. 35 acres.

(Testimony of David L. Richardson)

Q. Does that farm adjoin your father's farm?

A. Yes, sir.

Q. And your father's farm is how large?

A. Some of it has been sold. I don't know just how large it is now. It is 160 acres.

Q. When we took your deposition in October, this last October, 1946, do you remember testifying that your father's farm was 350 acres?

A. You must have gotten it wrong. It was 260 instead of 360.

Q. Even if some of it has been sold, how large was it before part of it was sold? A. 260.

Q. And what do you have on your farm and your father's farm?

A. We raise cows and hogs and corn and cane.

Q. Do you grow some oats? A. Yes, sir.

Q. And do you grow some potatoes?

A. Yes, sir.

Q. And you do plowing work on the farm, do you not? A. Well, Dad does.

Q. You have assisted in some of that work in the last year, have you not? [141] A. Very little.

Q. But you have done some of it?

A. Some of it; yes.

Q. And you have fed some of the stock, have you not?

A. Yes.

Q. And you drive a truck and drive a tractor, do you not? A. I drive a tractor very little.

Q. You have done that work? A. Yes, sir.

Q. You have also driven a truck, haven't you?

A. Yes, sir; some.

(Testimony of David L. Richardson)

Q. Now, you are receiving pay from the United States Government, aren't you, Mr. Richardson?

A. Yes, sir.

Q. Will you tell the court how much you are getting?

A. \$41 and some few cents a month.

Q. You receive a check from the government for approximately \$41 each month? A. Yes, sir.

Q. And you expect to continue to receive that money indefinitely?

Mr. Hon: Just a minute, your Honor. I think that is immaterial, what he expects.

Mr. McHose: He testified as to this on his deposition. [142]

The Court: He may answer.

A. That is not left up to me whether I draw it the rest of my life or not. It is left up to the Veterans' Administration.

Q. You have received the money up to now?

A. Yes, sir.

Q. And you have not received any notification that you will not receive it in the future, have you?

A. No, sir; I haven't.

Q. Did you know the men who came to help you out of the bunker hatch? A. No, sir.

Q. You hadn't seen any of them before that time?

A. Not that I recall; no.

Q. And you don't know what their names are?

A. No, sir.

Mr. McHose: That is all the questions I have.

Q. By Mr. Gallagher: Mr. Richardson, when you entered the yard of the Bethlehem Company, did you have to go through a gate? A. Yes, sir.

(Testimony of David L. Richardson)

Q. Had you ever been in that yard before that night?

A. Yes, sir.

Q. On how many occasions?

A. Eight or 10; maybe more. I don't remember. [143]

Q. Had you inspected or boarded any tankers on those prior visits?

A. I don't remember whether I had boarded any tankers but I presume that I had.

Q. As you would approach the particular ship you intended to board, is it visible to you, as you recollect, on the dock? A. Yes, sir.

Q. How far away from the gate through which you walked to enter the yard of the Bethlehem Company was this particular ship?

A. Pardon me but ask that again.

Q. Do you remember walking through the outside gate to get into the yard? A. Yes, sir.

Q. Then, did you remain on the premises of the Bethlehem yard up until the time you walked aboard this ship?

A. Yes, sir.

Q. How far did you have to walk from the gate to the place where you got on the ship?

A. I would guess from 75 to 100 yards.

Q. As you approached the ship, did you come alongside the stern of the ship or the bow of the ship first?

A. The bow of the ship; yes, sir.

Q. It was up against the dock, that is, the starboard [144] side of the tanker was up against the dock?

A. Yes, sir.

(Testimony of David L. Richardson)

Q. As you walked along that 75 yards before you got to the ship, you could see the lighting conditions on the forward end of that vessel, couldn't you?

A. You couldn't see the ship until you got up pretty close to it. You kind of walked in a circle going down there and, when you get up close to the ship, you cannot see the top of the ship.

Q. When you went up the gangway, what lighting conditions did you observe before you went into the passageway?

A. A light at the gangplank and lights on the dock.

Q. Let's just stick to the ship now. Was there more than one light on any part of the forward portion of that ship when you boarded it?

A. The light at the gangplank was the only one I saw.

Q. Other than the light at the head of the gangplank, you knew that the entire forward portion of the ship was in darkness, didn't you?

A. Not the entire forward end of the ship.

Q. Well, what portion of it was illuminated?

A. The port side—you couldn't see on it, but the starboard side, by the lights from the dock, you could see.

Q. So that at the time you boarded the ship, the lights from the dock already illuminated the starboard side of the [145] deck? A. Yes, sir.

Q. And you could see plainly on that side of the deck if you wanted to walk on it, couldn't you?

A. Yes, sir.

Q. Was that starboard side of the deck fairly well illuminated through the entire length of the deck?

A. I don't remember about that.

(Testimony of David L. Richardson)

Q. Well, when you went aboard, did you look over toward the port side of the ship, before you went into the passageway?

A. I glanced around all over the ship.

Q. Could you see anything at all on the port side?

A. Not that I recall, I didn't see anything.

Q. What I am trying to find out is this. Did you look and were you unable to see anything on account of the darkness or did you just take a casual glance?

A. I just taken a casual glance.

Q. Then, you didn't make any effort to find out what the conditions were over there on the port side of the deck, did you? A. Not then; no, sir.

Q. When you went down the starboard passageway, did you stop anyplace before you made your turn?

A. No, sir; I didn't stop. [146]

Q. Were you walking continuously from the time you entered the forward end of the starboard passageway, up until the time you stepped into the hatch?

A. To my best recollection, I was.

Q. Then, you did not open any of the doors to any of the quarters in the starboard passageway, did you?

A. No, sir.

Q. And you didn't open any of the doors to any of the quarters or rooms along the port passageway, did you?

A. No, sir; I didn't.

Q. Now, in your experience in the Coast Guard, didn't you learn where the officers' quarters were located on tankers?

A. To the best of my knowledge, they were located at different places on different ships. Officers' quarters are generally above, ordinarily.

(Testimony of David L. Richardson)

Q. You would very seldom find the officers' quarters in the after end of the ship, isn't that right?

A. You find them up on the upper deck, the one above the main deck, most of the time.

Q. If you were looking for an officer, why didn't you go up to the upper deck instead of going through that passageway?

A. I would have went up there some time when I was on the ship, before I got through with it, through with my in- [147] spection.

Q. Will you please tell the court how you could inspect a dark place without a flashlight or some means of illumination?

A. Well, sir, up over your head, where them fire extinguishers and fire hose would ordinarily hang, you could see up high where they were, but down below there was a shadow, and that is the way I expect I found it.

Q. Did you have any light with you?

A. No, sir.

Q. Did you usually carry a flashlight?

A. No, sir.

Q. Was it your practice to roam in ships in pitch black darkness?

A. There wasn't many ships that was pitch black dark.

Q. Did you roam around ships that were in pitch black darkness?

Mr. Hon: I object to that as not within the issues of the case. It is purely argumentative as to what he may have done on other ships.

The Court: He may answer. Will you read the question, please?

(Testimony of David L. Richardson)

(Question read by reporter.)

A. If that duty called me, yes, sir.

Q. By Mr. Gallagher: You were told by your superior to [148] walk around in places that were not illuminated at all?

A. We were told to inspect ships, go all over them, whether there were lights there or not.

Q. Did you think that there was a passageway from the port side to the starboard side at that place?

A. Well, I've been across decks of ships, all over the main deck; not necessarily a passageway.

Q. From your experience in walking along tankers, you knew that you were about to run into hatches and pipes and valves and all sorts of machinery, didn't you?

A. Yes. But you could take your time going over.

Q. When you stepped out of the port passageway, you left this canvas flap closed behind you, didn't you?

A. Yes, sir.

Q. And at that time you couldn't even see a foot ahead of you, could you?

A. You could see lights on the dock.

Q. I am talking about the surface that you intended to walk on. A. No, sir; you couldn't see.

Q. Well, did you stop there for a minute to let your eyes become accustomed to the darkness?

A. When I set my left foot down—

Q. No. Tell me whether you stopped there or continued walking. [149]

A. That is when I fell. When I got at that hold, that is when I fell and I don't remember nothing else about it.

(Testimony of David L. Richardson)

Q. When you stepped out of the port passageway and you got out on the deck, did you stop still there at all?

A. I don't remember whether I stopped or not.

Q. When you stepped out of that passageway, which way were you facing?

The Court: Let me ask you at this time, is it necessary to go over the same ground that your co-counsel went over in your cross examination? I realize that you have a part in this lawsuit but I don't think you should cover the same ground that he covered.

Mr. Gallagher: I didn't think Mr. McHose covered the particular point that I am trying to cover. Your Honor asked him a question on that same subject.

The Court: I thought he went into his actions quite thoroughly when he was cross examined, as to what happened.

Mr. McHose: I think Mr. Gallagher is correct, your Honor. That particular question, I don't believe, has been answered and I would like to have it.

The Court: You may proceed but I want you to keep in mind, however, you should avoid re-asking any questions that have been gone into by your co-counsel, if possible.

Mr. McHose: We are not co-counsel, your Honor.

The Court: You are in some respects. You have common [150] interests. You may answer the question.

Mr. Gallagher: Will you read it, please?

(Question read by reporter.)

A. When I first stepped out, I was facing forward of the ship, when I set my left foot down.

(Testimony of David L. Richardson)

Q. And then how did you turn?

A. I turned to the right.

Q. Did you lift your left foot off of the deck while you were turning to the right?

A. I brought my right one right out of the passageway.

Q. What did you do with your left foot? Did you leave it right there?

A. It was right where I set it down.

Q. So the only foot that you moved at all after you placed your left foot out on the deck, up to the time you went into the hatch, was the right foot?

A. The right foot; yes, sir.

The Court: That is to say, you were facing forward as you took a step, the first step, with your left foot?

A. Yes, sir.

The Court: And at that particular moment you were looking forward? A. Yes, sir.

The Court: And then, when you set out your right foot, you were facing which way? [151]

A. Right.

The Court: And you fell, is that it?

A. My right foot never did strike no deck.

The Court: In other words, you were headed in a direction towards the right when you fell?

A. Yes, sir.

Q. By Mr. Gallagher: Is this what you mean, that you stepped out and put your left foot on the deck and then you reached over with the right foot like that and stuck it in the bunker hatch?

The Court: Do you want to illustrate?

Mr. Gallagher: Yes.

(Testimony of David L. Richardson)

Q. Show us how you did it.

A. When I walked up there and pushed that back, I stepped out like that and paused, or I guess I paused or I think I did, and, as I come out, I turned like that and that is when I fell and that is the last I remember.

The Court: Indicating that you stepped out with your left foot and, when you paused, or after you paused, you turned and you stepped out with your right foot?

A. Yes, sir.

Q. By Mr. Gallagher: Did you see anybody from the Coast Guard there in the vicinity of the ship after the accident happened, excepting the ambulance?

A. Yes, sir. [152]

Q. Who did you see there?

A. Lieutenant Bodine. He was the O. D. at the time and, when they called him, he came out to the ship, and there were other guys or men there.

Q. Other Coast Guard people? A. Yes, sir.

Q. Did you see anybody come from the shipyard?

A. When I was laying there on the deck, they just all got around. I didn't see where they come from.

Q. Did you see anybody board the ship after the accident?

A. No, sir; I didn't see anybody because I was laying down on the deck.

Mr. Gallagher: I think that is all.

Redirect Examination

Q. By Mr. Hon: Mr. Richardson, you were asked if you had seen bunker hatches open. Did you ever see any bunker hatches or any hatches open on a ship, left open, that were not cargo?

Mr. McHose: What do you mean by "not cargo"?

(Testimony of David L. Richardson)

Mr. Hon: Well, some means to prevent people from falling in.

A. I didn't ever see any that wasn't cargo. I seen some that didn't have lines up on them, but there would be a man there at the hold and maybe men in the hatch working. [153]

Q. You stated that you get money from the government, I think \$41. What is that based on?

A. 30 per cent disability.

Q. The government gave you a 30 per cent disability rating, is that right? A. Yes, sir.

Q. You also mentioned something about a 35-acre farm. Is that farm improved or is it wood land?

A. It is not but 7 or 8 acres of it is in cultivation. The rest of it is in woods.

Q. Do you actually own that farm?

A. Well, I am paying for it gradually. I haven't got it paid for.

Q. How much have you paid down on it?

A. \$400.

Q. And you owe how much on it? A. \$800.

Q. In other words, you have got \$400 paid down on this piece of ground where you and your wife live?

A. Yes, sir.

Q. And you still owe 800 on it? A. Yes, sir.

Q. Were you ordered by your officer-of-the-day at any time to carry a flashlight? A. No, sir. [154]

Q. Were you ever furnished a flashlight?

A. No, sir.

Mr. Hon: That is all.

Mr. McHose: I would like to ask about two more questions, if I may.